THE CENTRAL LAW JOURNAL.

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Current Topics.

THE BELKNAP IMPEACHMENT.—On Monday, the 29th ult., the senate, after a lengthy discussion, by a vote of 37 to 29, overruled the plea of the defendant to the jurisdiction of the court, and resolved that, "in the opinion of the senate, W. W. Belknap, the respondent, is amenable to trial by impeachment, for acts done as secretary of war, notwithstanding his resignation of said office before he was impeached." Having decided this, it is thought that the trial will be postponed until November, when the senate will re-assemble for that special purpose. As a large number of witnesses will be examined in the case, it is probable that the trial will consume six weeks' or two months' time, which would prolong the session of Congress until about the 1st of September; as after the trial, a month or six weeks would be required to finish necessary legislative business.

WHAT DECISIONS OF A STATE COURT CAN BE RE-EXAMINED IN UNITED STATES SUPREME COURT.—In The Republican River Bridge Co. v. The Kansas Pacific R. R., October term, 1875, this court, by Mr. Justice Miller, laid down the two following rules upon the above point: 1. Where a right is set up under an act of Congress in a state court, any matter of law found in the record, decided by the highest court of the state, bearing on the right so set up under the act of Congress, can be re-examined. 2. In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the state, the same record being brought here, this court can review the decision of that court on both the law and the facts, so far as may be necessary to determine the validity of the right set up under the act of Congress. But in cases where the facts are submitted to a jury and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts in a case coming from a state court, that it has in a case coming from a circuit court of the United States.

IMPORTANT DECISION—RAILROAD-AID BONDS IN MISSOURI.—We publish in this issue an important decision recently delivered by the Supreme Court of the United States, —Harshman v. Bates County. The facts of the case are as follows: In 1868, the legislature of this state passed an act to authorize counties, cities, towns, etc., to subscribe money in aid of railways, provided the proposition received the assent of *two-thirds of the legal voters, voting at the election* to be held under the provisions of the act. Section 14, of the Constitution of Missouri provided that the general assembly should not authorize any county, city or town, to become a stockholder in, or loan its credit to, any company, association or corporation, unless *two-thirds of the qualified voters* of such county, city or town should assent thereto. The bonds in this case were issued under the act of 1868. The court held that the act authorized what the constitution positively prohibited and was therefore unconstitutional, and the bonds issued thereunder void. This decision it is thought will render void nearly all the township bonds in the state, amounting according to the last report of the state auditor to nearly three millions of dollars.

WE received this week as a supplement to the *Albany Law Journal*, the address delivered by Hon. Lyman Tremain, to the graduating class of the Albany Law School, delivered on the 17th of May. It is full of rich and apposite thoughts, and makes a graceful addition to the high professional character of the eminent and eloquent advocate. His views of the duties and responsibilities of the lawyer, while very appropriately adapted to the young gentlemen to whom they were addressed, just embarking in the profession, can be profitably read by those of more advanced years. He discusses at some length the moral right of a lawyer to defend a criminal charged with a capital offence, and holds, very properly, as we think, that in such cases the lawyer selected can not become the prisoner's judge, nor evade the duty of assuming his defence. Mr. Tremain "magnifies his profession," as all good and true lawyers should, and quotes the opinion of De Tocqueville, who pronounced the bench and bar of this country its only aristocracy. We make the following extracts from the address, only regretting that our limited space prevents our extracting more freely from it: "The bar of this country have always exercised, and may now exert, a more powerful and salutary influence in shaping the policy and molding the destinies of the nation than any other body of men. This power brings with it a corresponding degree of responsibility which rests upon every member of the profession. * * * In the history of the United States there has never been a period when the influence of a learned and patriotic bar was more needed than at the time when you are called to its high privileges. This is the centennial year of the republic. The nation is bending its head in sorrow and shame over the recent fall of one of its high cabinet ministers. On every hand we hear rumors of peculation, fraud and corruption. Let it be your duty and your pleasure, wheresoever you may be located, and to whichsoever political party you may belong, to raise your voice and exert your influence in behalf of purity, integrity and the restoration of the honesty of the fathers of the republic. The patriotic lawyer will resolve that we must not, and can not, surrender our frame of government, which, with all its faults, is superior to any other on earth. He will rather believe that he sees clear evidence that the national conscience is everywhere being quickenened into new life; that the nation itself is struggling to attain a higher and purer elevation, and in this belief will do all in his power to aid in lifting the people to a loftier plane of morality and honor, leaving the result in the hands of Him who has hitherto protected, preserved and advanced the republic."

EXTRADITION OF FUGITIVES FROM ONE STATE TO ANOTHER—FALSE IMPRISONMENT.—This subject has recently come before the United States District Court for the Eastern District of New York. *In re* Titus, 5 Chicago Leg. News, 284. This was a petition for a writ of *habeas corpus* under the following circumstances: On November 7th, the governor of Arkansas commissioned the petitioner to present to the governor of New York his requisition for the surrender of McDonald, a fugitive from justice, together with a copy of the indictment. The petitioner presented the requisition to the governor of New York, who issued his mandate to the sheriff of Kings county, directing the arrest of McDonald, and his delivery to the petitioner. The sheriff arrested McDonald for the purpose of delivering him to the petitioner, but before he could make such delivery, he was released from his custody on *habeas corpus*, issued by a state judge. After being so released, McDonald brought an action for malicious prosecution, in the state court, against the petitioner, who was arrested in such action. Judge Benedict allowed the writ, holding that acts performed in and about the surrender of

fugitives from justice, are acts done in pursuance of the laws of the United States, and that the petitioner, being a mere messenger of the governor of Arkansas, was not bound to look into the indictment and determine whether or not it charged a crime within the meaning of the United States statutes, and no personal liability being, therefore, incurred, the case could not be changed by the allegation that the motives actuating the petitioner were malicious. "By the constitution of the United States," said the learned judge, "the whole subject of inter-state extradition is remitted to the cognizance of the general government. The jurisdiction of the government of the United States is exclusive. Prigg v. Commonwealth of Penn., 16 Pet., 622. The act of 1793, now section 5,278 of the Revised Statutes of the United States, provides the method by which such extradition is to be accomplished. That statute authorizes the executive authority of any state from which a fugitive from justice may have fled, to demand his return of the executive authority of the state to which such person has fled, upon producing to such executive a copy of an indictment found, or an affidavit made before a magistrate of the state, charging the person demanded with having committed treason, felony or other crime, such indictment or affidavit to be certified as authentic by the governor or chief magistrate of the state from which the person so charged has fled. Upon receipt of the requisition and certified indictment, the executive authority of the state to which such person has fled, is authorized to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making the demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent, when he shall appear. There are no laws of the state to authorize the acts specified in the act of Congress. The governors and their agents are compelled, therefore, to rely upon the statute of the United States for authority to do the acts required thereby, and the statute of the United States affords them justification. It seems impossible, therefore, to hold that when they so act, they act otherwise than in pursuance of a law of the United States. In so acting they but discharge an absolute obligation created by a law of the United States, which they are bound to perform, and for which there is no other law, and their acts are none the less acts done in pursuance of a law of the United States, because, as decided in Kentucky v. Dennison, 24 How. 66, there is no power in the general government to use coercive measures to compel performance."

The Defective Ventilation of Court Houses.

Five of the New York judges have been compelled to cease work on account of the bad ventilation of the court house of that city, and the report of the sanitary commission on the subject declares that the poisoned air of the building is positively dangerous to life. This will no doubt turn public attention for a time to a much discussed but much neglected subject. The noxious atmosphere of the average court room is an evil which judges have again and again complained of; juries have reported the matter, the newspapers have frequently called attention to it, but for the most part with small success. Only a few weeks ago Congress had the question before it. It was discovered that sickness among the members of both houses, was, to a large extent, the result of the defective ventilation of the chambers, and a committee was appointed to investigate the subject.

All our public buildings, our halls, churches, opera houses and theatres, are imperfect in this regard. But none of them are so alarmingly defective as our court houses. Little wonder is it that judge after judge breaks down. In an atmosphere which, to use a common expression, is almost capable of being cut with a knife, and which it is doubtful if it is ever thoroughly changed, he is forced to exist, the day long. The lawyers and litigants and witnesses may come and go, but he must sit on forever,—or until, like the five New York judges, he is forbidden by his physician to take the risk any longer. The old English courts—the Old Bailey for example—were dens of filth and disease. But such a disgrace speedily brought its own judgment, and the Black Assize of Oxford was not soon forgotten. The American court house is not as bad as this, but it is none the less a disgrace to the age, and an insult to the dignity of justice. The great modern epic describes the impressions of one who, accustomed to dwell in populous cities, "where houses thick and sewers offend the air," finds himself among green fields, around him the perfume of flowers, the low of kine, the songs of birds. To describe the transition from the court room of to-day to such a scene would require the pen of a second Milton.

The public at large are as deeply interested in the abatement of this nuisance, as those who suffer directly from it. For it is much easier to imagine bad air breeding noxious judgments, than to expect pure decisions to emanate from a foul atmosphere. When Cicero rose in the forum before the Qurites, his only canopy was the sky.

The fault of the architecture of our public buildings has been, that the designer has not sufficiently realized the difference between the climate of America and that of the lands whose edifices he is so fond of copying. Our architects still rear the Grecian portico and the Latin cupola, the Tuscan capital and the Corinthian column; but they overlook the important fact, which a modern scientist has pointed out, that architecture had risen to the eminence of a great art, in times when men knew as little about the functions of the lungs, as they did about the circulation of the blood, and hundreds of years before even the properties of the air had been discovered. A knowledge of the absolute importance of proper ventilation, and the ability to adapt the works of the old masters to the exigencies and changes of our climate, will work a wonderful change. The true architect of the future will combine beauty, convenience, health and comfort, even though his *facade* may suffer in the process.

Judicial Notice of Scientific Matters.

One of the most novel and interesting cases decided during the last term of the United States Court was that of Brown *et al.* v. Piper. It was an application for a patent. The bill was founded upon an invention for a new and improved method of preserving fish and meats. The plaintiff did not profess to have invented the means of artificial congelation, nor to have discovered the fact that no decay takes place in animal substances so long as they are kept a few degrees below the freezing point of water, but what he claimed as new, and desired to secure by letters-patent, was the practical application of these principles to the art of preserving fish and meats, in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber. The defence relied on in the answer was the want of novelty in the invention, and the fact that the principle had been previously known and in use. On the last ground, one case was considered and held a good defence. Some twenty years before a patent had been issued for a "corpse preserver." This apparatus had a double case, the space between the two being filled with ice. There was no communication between the tray containing the freezing mixture and the inner compartment containing the body. A witness was examined, who testified that he was an undertaker, and had used the apparatus for about twenty years—sometimes with ice under the false bottom, and sometimes without it. In either case he

applied a sufficient degree of cold to prevent putrefaction before interment. He thought the bodies were sometimes frozen, but was not certain. The material point in his business was the prevention of decay for the time being, and that was always accomplished. This, said Mr. Justice Swayne, was the application of the requisite degree of cold exactly in the manner called for in the specification of the petitioner. But it was insisted that the process was never applied by the witness to the preservation of fish and meats. The answer in the opinion of the learned judge was that this was simply the application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original, in the sense of the patent law. The thing was within the circle of what was well known before, and belonged to the public. No one could lawfully appropriate it to himself and exclude others from using it in any usual way for any purpose to which it may be desired to apply it. This is fatal to the patent. Ames v. Howard, 1 Sumner, 487, Howe v. Abbot, 2 Story, 194; Bean v. Smalwood, id. 411; Winans v. B. & P. R. R. id. 412; Hotchkiss v. Greenwood, 11 How. 266..

The learned judge then proceeded to consider the subject of judicial cognizance of scientific matters, as he thought, that, notwithstanding the proof of a prior similar invention, this was a view of the case that might properly be taken. Evidence of the state of art, he said, is admissible in actions at law under the general issue without a special notice, and in equity cases without any averment in the answer touching the subject. It consists of proof of what was old and in general use at the time of the alleged invention. It is received for three purposes: to show what is old, to distinguish what is new and to aid the court in the construction of the patent. Of private and special facts, in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge. But there are many things of which judicial cognizance may may be taken. "To require proof of every fact, as that Calais is beyond the jurisdiction of the court would be utterly and absolutely absurd. Gres. Ev. in Eq. 294. Facts of universal notoriety need not be proved. Taylor Ev. § 4. n. 2. Among the things of which judicial notice is taken is the law of nations; the general customs and usages of merchants; the notary's seal, things which must happen according to the laws of nature; the coincidences of the days of the week with those of the month; the meaning of the words in the vernacular language; the customary abbreviation of christian names; the accession of the chief magistrate to office and his leaving it. In this country such notice is taken of the appointment of members of the cabinet, the election and registration of senators, and of the appointment of marshals and sheriffs, but not of their deputies. The courts of the United States take judicial notice of the ports and waters of the United States where the tide ebbs and flows; of the boundaries of the several states and judicial districts, and of the laws and jurisprudence of the several states in which they exercise jurisdiction. Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases before him. 1 Geren. Ev. 10; Gresleys Ev. *supra*; Taylor Ev. § 4. and *post*. In The Ohio L. & T. Co. v. Debolt, 16 How. 435, it was said to be "a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of companies" of the classes named is prepared and passed under the circumstance stated. In Hoare v. Silverlock, 12 Ad. & Ellis (N. S.), 624, it was *held*, that where a libel charged that the friends of the plaintiff had "realized the fable of the frozen snake," the court would take notice that the knowledge of that fable existed generally in society. This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.

Atmospheric air is itself an agent of decay, and in all such cases it is important to preclude as far as possible its presence and contact. If air be absolutely excluded, putrefaction ceases, and the result is the preservation of the substance in some circumstances, perhaps in all. 3 Ure's Dic. of Arts, 548. On this principle is founded Appert's process, by which easily decomposable articles of food and drink, such as meat, fish, vegetables, milk, etc., are preserved for years, viz: by packing them in air tight bottles or soldered tin cans, heating the vessels for several hours in boiling water, and keeping them carefully closed." 3 Watt's Dic. of Chem. 625. The patentee is to be presumed to have known this property of air. The preservative effect of cold, and especially of dry cold, is well known and exemplified in the keeping of meat and fruit in ice-houses. Animals have been found undecomposed in the ice of Siberia, which belong to extinct species, and which must have been embalmed in ice for ages. Tit. "Antiseptic," 1 Am. Encyclo. 570. Artificial freezing is usually applied to water and articles of food. There are two general methods of effecting it, viz: by liquification and by vaporization and expansion. The method by liquification is performed by freezing mixtures which are formed by mixing together two or more bodies, one or all of which may be solid. They are used together in vessels having three or more concentric apartments—an inner one containing the article to be frozen; one eccentric to this containing the freezing mixture, provided with some contrivance for agitation; one, again, outside of this, filled with a non-conductor of heat, as powdered charcoal, gypsum, or cotton wool; and sometimes one between them for holding water. Tit. "Freezing," 7 id. 474. Here the principle and substance of the appellee's claim are set forth as belonging to the general domain of knowledge and science. It is known that Lord Bacon applied snow to poultry to preserve it. He said the process succeeded "excellently well." The experiment was made in his old age, imprudently, and brought on his last illness. Examined by the light of these considerations, Mr. Justice Swayne thought the patent was void on its face, and that the court might have stopped short at that instrument without looking further into the answer or taking testimony in regard to other and prior patents for a similar process.

Liability of Railroad Companies for Animals Killed at Public Crossings—Failure to give Signals.

HOLMAN v. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.*

Supreme Court of Missouri, May Term, 1876.

Hon. DAVID WAGNER, Chief Justice.
" WM. B. NAPTON, } Judges.
" T. A. SHERWOOD, }
" WARWICK HOUGH, }

Where an animal is killed by a train at a public crossing, proof that the employees in charge of the train failed to ring the bell or sound the whistle, as required by the statute, (Wag. Stat. 310, § 8), is not sufficient to authorize a verdict against the company. It must be further shown by facts and circumstances that such neglect caused the injury. The failure to give the signals is negligence, but having shown that fact, it must be supplemented by testimony to show that the negligence caused the damage, and the burden of proof is upon the plaintiff to show that such negligence caused the injury. Howenstein v. Pacific Railroad, 55 Mo. 33, overruled; Owens v. Han. & St. Joe R. Co. 58 Mo. 386, not followed.

Appeal from the Clinton Circuit Court.

*For the report of this case we are indebted to M. A. Low, Trenton, Mo.

William Henry, for plaintiff; *Shanklin, Low & McDougal*, for defendant.

HOUGH, J., delivered the opinion of the court.

This was an action to recover damages for the killing of a cow belonging to the plaintiff, by a train on defendant's railroad, in a street of the town of Cameron.

The evidence given at the trial is stated in the bill of exceptions in the following language:

"The plaintiff, to maintain the issues on his part, introduced evidence tending to show that the bell was not rung, nor the whistle sounded on the train, mentioned in his statement, as it approached and ran over the cow in controversy; that the cow was killed on defendant's railroad on a public traveled street of the town of Cameron, in Shoal township, by a train on the said railroad, and that said cow was worth thirty-five dollars.

"The defendant introduced one Kiley, who testified, that he was the conductor on said train, and that the bell was rung and the whistle sounded. This was all the evidence offered."

It will be unnecessary to notice the instructions given and refused.

There was a verdict and judgment for the plaintiff, and the defendant has brought the case here by appeal.

The statute in relation to railroad corporations, which requires the bell on the locomotive to be rung, or the steam whistle to be sounded before reaching, and while crossing, any traveled public road or street, provides a penalty for the neglect of such requirement, and further declares that the corporation shall be liable for all damages which shall be sustained by any person *by reason of such neglect*.

Conceding that the servants of the defendant neglected to ring the bell or sound the whistle, the question is, whether there is any evidence tending to show that the cow was killed by reason of such neglect.

In the case of Stoneman v. The Atlantic and Pacific Railroad Company, 58 Mo. 503, it was said on the point in judgment, that "the court had no right to declare as a matter of law, that the jury had nothing to find but the killing of the animal at a crossing of a public highway, and the failure of the company to have the bell rung, or the whistle sounded.

"There may have been no connection whatever between the negligent omissions and the damages, and the very terms of the statute under which the suit is brought clearly indicate that the damage must be the the result of the negligence."

The foregoing extract clearly asserts that there is no necessary connection between the failure to ring the bell, or sound the whistle, and the killing; that both may concur in point of time, and the latter not be the result of the former. How then must the construction be shown? By evidence, undoubtedly, by the party who asserts that such connection exists. The damage must be shown to be the result of the negligence; that is, the negligence must first be shown, and this fact must be supplemented by testimony tending to show that the negligence occasioned the damage.

This testimony should consist of all the facts and circumstances attending the killing, so that the jury could fairly and rationally conclude whether it resulted from the failure to ring the bell, or sound the whistle, or from other causes. In the case at bar, no such testimony was offered. But two facts were shown to fix the defendant's liability; the failure to give the required signal at the crossing, and the killing.

No fact was shown tending to connect the two. If the plaintiff can recover on the evidence embodied in the bill of exceptions, it must be because it is only necessary for the jury to find the killing of the animal on the highway, and the failure to ring the bell, or sound the whistle, for there is no testimony from which they can find more. But this we have seen is not sufficient. Upon the case made, it was the duty of the court to declare, as a matter of law, that the plaintiff was not entitled to recover.

This conclusion has been reached after a careful consideration of the case of Owens v. Han. and St. J. R. R. Co., 58 Mo. 386, and Howenstein v. Pacific Railroad, 55 Mo. 33.

The judgment must be reversed and the cause remanded. All the judges concur, except Judge Vories, who is absent.

Jurisdiction in Matter of Extradition.

EX PARTE VAN HOVEN.

United States Circuit Court, District of Minnesota, April, 1876.

Before Hon. RENSELLAER R. NELSON, District Judge.

1. Warrant may issue from Department of State.—The sixth article of the treaty of May 1st, 1874, between the United States and Belgium, expressly provides for requisition on the part of the government applying, and consent of the government applied to. It is not necessary that the warrant on such requisition be issued by the President. It is sufficient if it issue from the state department under its official seal. In foreign relations, and executive acts imposed by treaty stipulations, the President acts through that department.

2. Requisites of the Complaint.—Where the complaint charges the crime of forgery as having been committed on a certain day in the jurisdiction of the foreign government, in that one "wilfully, etc., uttered and put in circulation forged or counterfeit papers, or obligations, or other titles or instruments of credits," without specifying the kind of obligations forged, or the character of the papers, or nature of titles, etc., it is defective at common law, does not fairly inform accused of the charge, and does not show probable cause for arrest.

NELSON, J.—The counsel for the petitioner upon the argument of the demurrer has presented, and urged with great ability, objections to the proceedings instituted by the Belgian government to obtain the extradition, which may be reduced to two in number.

I. That the commissioner had no jurisdiction under the treaty stipulations between the two countries, to issue any warrant for the arrest and examination of persons charged with the commission of forgery with a view to their extraditon.

II. That the complaint upon which the warrant was issued by the commissioner does not make out a case or contain such a statement of the offence as would justify a warrant of arrest.

I shall take up the first objection, and with a view of stripping the case of some questions that were presented on the argument, state that, in my opinion, the judicial arm of the government is powerless to arrest any alleged fugitive from justice, whose extradition is demanded by a foreign government under any treaty with the United States, without a requisition having been previously made by the foreign government upon the United States, and its authority obtained to apprehend such fugitive. The sixth article of the treaty proclaimed May 1, 1874, between the United States and Belgium, provides expressly for such requisition and consent to the arrest on the part of the government applied to.

Has such requisition been made and consent been obtained? The mandate or warrant issued by the department of state recites the fact that such requisition was made by the proper officers of the Belgian government in pursuance of the treaty, and this mandate is the only evidence that the President of the United States initiated the proceedings or authorized the apprehension of the prisoner.

The objection that such warrant is not issued by the President of the United States, because it emanates from the state department, and is signed by the secretary of state and under his official seal, in my opinion is not tenable. The history of the government shows that in all our foreign relations the President, in preforming executive acts imposed by treaty stipulations or otherwise, acts through the department of state, and under its official seal. And when, as in this case, a warrant or mandate is signed by the secretary of state, it is the act of the President through the proper executive department of the government.

Thus, upon the face of the papers which are admitted by the demurrer to be true, the requisition has been properly made by the Belgian government, and a proper warrant has been issued by the President of the United States to authorize the commissioners to act.

I have no authority to go behind the warrant which has been issued by the President through the state department, and it must be taken as a fact that the President discharged his executive functions in accordance with the terms of the 6th article of the treaty.

The act of Congress in relation to "Extradition," (Title 66, Revised Statutes U. S., page 1,026,) authorizes certain judicial officers "whenever a treaty for extradition exists between the government of the United States and any foreign government, upon complaint being made under oath charging any person found within the limits of any state, district or territory, who, having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, to issue his warrant for the apprehension of the person so charged, that he may be brought before such commissioner to the end that the evidence of criminality may be heard and considered." And in case such commissioner deems the evidence sufficient to sustain the charge made, he certifies the same, together with all the testimony, to the secretary of state, that a warrant may issue for his surrender.

This act of Congress applies to all treaties made before or after its passage, and was necessary in order to give the judicial department of the government jurisdiction to investigate the charge of crime alleged to have been committed within the limits of a foreign government.

The commissioner for the Circuit Court of the United States, for the Southern District of New York, in obedience to the warrant of the President, and upon complaint made by the consul-general of Belgium, resident in the city of New York, has issued his warrant of arrest for the purpose of investigating the charges made against the prisoner, and he had authority so to do, provided the complaint by the consul-general made out a proper case.

And this brings me to a consideration of the next and last objection. The complaint charges that Van Hoven committed within the jurisdiction of the kingdom of Belgium the crime of forgery, as it is specifically mentioned in the treaty of 1874, to-wit: "With having within the jurisdiction of the kingdom of Belgium, and in violation of the laws thereof, and for his own benefit, and on or about the 21st day of December, 1875, wilfully and knowingly and maliciously uttered and put in circulation forged papers, or counterfeit papers, or counterfeit obligations, or other titles, or instruments of credits." This is the charge in *hæc verba*, without specifying the kind of obligations forged, or the character of the papers, or the nature of the titles, or instruments of credits forged.

Is such a complaint sufficiently definite for the purpose of jurisdiction? It is not necessary that a complaint should be drawn with the formal precision of an indictment, but the accused should be fairly informed of the charge made, so that he might be able to meet the investigation.

In the case of "Heinrich," (5th Blatchford C. C. R. P. 8, 414) the court says: "The complaint upon which the warrant of arrest is asked should set forth clearly but briefly the substance of the offence charged, and the substantial, material features thereof." I think, tested by the above decision, the complaint does not show probable cause for the arrest, and at common law is defective.

The consul does not pretend to be familiar with the particulars of the alleged crime, and he has no personal knowledge of any of the facts, and states that he makes the complaint by virtue of his office and for the purpose of giving effect to the treaty.

Clearly, under our system of crimininal jurisprudence, such a complaint would not authorize the arrest of one of our citizens, and it can not have been the intention of the treaty-making power or the Congress of the United States to have permitted the arrest of an alleged fugitive upon a complaint which would be defective in the former case.

The petitioner, therefore, must be discharged from custody.

Railway-Aid Bonds.

HARSHMAN v. BATES COUNTY.

Supreme Court of the United States, October Term, 1875.

1. **Construction of Constitution and Statute.**—The constitution of Missouri declared that "the general assembly shall not authorize any *county, city, or town* to become a stockholder in, or to loan its credit to, any company, association or corporation, unless *two-thirds of the qualified voters* of such county, city or town, at a regular or special election to be held therein, shall assent thereto." The township aid act of 1868 enacted that subscriptions should be made, provided that two-thirds of the qualified voters of the township, *voting at at such election*, should assent thereto. *Held*, that this statute, not conforming to the requirements of the constitution, was unconstitutional, and that bonds issued thereunder are void.

2. **Townships Included.**—The words county, city or town, as used in the constitution, embrace every political organization which could be supposed capable of making a subscription, and therefore include townships.

3. **Company Consolidation Law.**—The law of Missouri authorizing the consolidation of railway companies does not continue in existence powers to subscribe for stock which are unexecuted. The extinction of a company by consolidation works a revocation of all rights not vested.

In error to the Circuit Court of the United States for the Western District of Missouri.

Mr. Justice BRADLEY delivered the opinion of the Court.

This is an action brought to recover the amount due on certain coupons attached to bonds of Bates county, Missouri, issued at the request and on account of Mount Pleasant township, in said county, in payment of a subscription on behalf of the township to the capital stock of the Lexington, Lake and Gulf Railroad Company. The subscription was made under a law of Missouri, called the "Township Aid Act," passed in 1868, by which, on the application of twenty-five tax-payers and residents of any township for election purposes in any county, the county court may order an election to be held in such township to determine whether and on what terms a subscription to any railroad to be built in or near the township shall be made; and if *two-thirds of the qualified voters of the township, voting at such election*, are in favor of the subscription, the county court shall make it in behalf of the township, and if bonds are proposed to pay the subscription, the court shall issue such bonds in the name of the county, but to be provided for by the township. It is contended that this law is repugnant to the 14th section of article 11 of the constitution of Missouri, adopted in 1865, by which it is declared that "the general assembly shall not authorize any *county, city or town* to become a stockholder in, or to loan its credit to, any company association, or corporation, *unless two-thirds of the qualified voters of such county, city, or town*, at a regular or special election to be held therein, shall assent thereto". Now, the law of 1868 only requires the assent of two-thirds of the qualified voters who vote at such election. This is certainly a broad difference; and if the constitutional restriction extends, by implication, to townships, as well as to counties, cities and towns, an election not conforming to the requirements of the constitution would be invalid and confer no authority to make a subscription. The petition in this case only alleges that two-thirds of the qualified voters voting at the election voted in favor of the subscription; which does not satisfy the demands of the constitution. The question, therefore, arises whether townships are within the restriction of the constitutional provision. A township is a different thing from a town in the organic law of Missouri, the latter being an incorporated municipality, the former only a geographical subdivision of a county. As said in the State v. Linn County Court (44 Mo. 510), "it has no power by itself to make independent contracts or to become bound in its separate capacity. The law has not invested it with that power. It forms an integral part of the county, and the county to a certain extent controls and acts for it." That the framers of the constitution intended to require the assent of two-thirds of all the qualified voters of a "county, city or town," as a prerequisite to a subscription to a railroad or other company, and did not intend the same thing with regard to townships seems almost absurd. It was undoubtedly supposed that every case was provided for. The 18th section of article 11 declared that the credit of the state should not be given or used in aid of corporations; the 14th section then imposes the restriction referred to with regard to counties, cities and towns. This specification embraced every political organization which could be supposed capable of making a subscription. To contend that the mere subdivision of counties into townships enabled the legislature to defeat the constitutional provision is to ignore the manifest intention and spirit of that instrument. It cannot be possible that it was intended to restrict the legislature as to counties and not restrict it as to mere sectional portions of counties. Had counties alone been mentioned, there might have been no restriction as to cities and towns, because they are separate and distinct organizations, corporate in character, and often clothed with legislative functions. But in Missouri, in 1865, when the constitution was adopted, township had no corporate character, but, as before stated, was a mere geographical section of a county partitioned off for purposes of local convenience in the matter of elections and a few other things. They had no power to act as corporate bodies. If the legislature could clothe these geographical portions of a county with power to subscribe to stock companies at all, it certainly could not set at nought the constitutional requirement of the people's consent thereto.

The court below did not decide the case on this ground, probably in consequence of certain decisions of the state courts which were deemed inconsistent with it. But we are not aware of any decisions of those courts which hold that the constitutional restriction in question could be ignored with regard to townships any more than with regard to counties, cities or towns.

Another objection to the validity of the subscription for which the bonds were given in this case is, that the township voted a subscription to one company and the county court subscribed to another. This is sought to be justified on the ground that the former company became consolidated with another, thereby forming a third, to whose stock the subscription was made. This consolidation was effected under a law of Missouri authorizing consolidations, and declaring that the company formed from two companies should be entitled to all the powers, rights, privileges and immunities which belong to either; and it is contended that this provision of the law justified the county court in making the subscription without further authority from the people of the township. But did not the authority cease by the extinction of the company voted for? No subscription had been made. No vested right had accrued to the company. The case of the State v. Linn County Court 44 Mo. 504, only decides that if the county court refuses to issue bonds after making a subscription, a *mandamus* will lie to compel it to issue them. There the authority had been executed and a right had become vested. But so long as it remains unexecuted, the occurrence of any event which creates a revocation in law will extinguish the power. The extinction of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent. It may transfer the vested rights of one railroad company to another upon a consolidation being effected; but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such a change. It does not profess to do so, and we think that it does not do so by implication.

As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on enquiry, we think that there was no error in the judgment of the circuit court; and it is, therefore, affirmed.

NOTE.—In view of the large amount of *township* bonds issued in Missouri, the above is an important decision, although resting in some respects upon special grounds. In respect of the first ground of the opinion. See St. Joseph Township v. Rogers, U. S. Sup. Court, December Term, 1872, Wall. in which, in an action on municipal bonds, the phrase "a majority of legal voters of the township," was held to mean a majority of the legal voters of the township voting at the election. See, also, cases cited from Missouri and elswhere, in 1 Dillon, Munic. Corp. (2d Edition,) Sec. 23 p. 129, note.

2. The opinion of the circuit court in the above case is reported in 3 Dillon, C. C. R.—[ED. CENT. LAW J.]

Homestead Law—Conveyance by Husband—Joinder of Wife.

HOGE v. HOLLISTER, *ET AL.*

In the Chancery Court at Nashville, Tennessee, April Term, 1876.

Before Hon. W. F. COOPER, Chancellor.

Homestead—Conveyance by Husband—Joinder of Wife.—Under a statute which exempts from legal process a homestead in the possession of the head of a family, and the improvements therein, to the value in all of one thousand dollars, to inure to the benefit of the widow, and provides that the property shall not be alienated without the joint consent of husband and wife, evidenced by conveyance duly executed as required by law for married women, a deed by the husband, in whom was the legal title, neither naming the wife nor mentioning the homestead right, will not pass the homestead right nor estop the husband and wife from claiming the same, although signed by the wife and proved as required by law for married women.

John Ruhm, for complainant; *A. G. Merritt*, for defendants.

COOPER, C.—On the 23rd of September, 1874, C. L. Hollister conveyed a house and lot in Nashville, on which he and his wife then lived as a family residence, but the title to which was exclusively in him, to a trustee for the benefit of creditors, by deed duly acknowledged by him on that day, and registered on the 28th of the same month. Afterwards, on the 29th of December, 1874, Mary I. Hollister, the wife, signed her name to the deed, acknowledged its execution with privy examination according to law, and, on the 2d of January, 1875, the deed, with both certificates of probate, was again registered. The deed, on its face, is an ordinary conveyance of the land by C. L. Hollister, with covenants of general warranty, neither naming the wife, nor mentioning the homestead right.

On the 17th of January, 1876, the bill in this cause was filed, among other things, for the purpose of foreclosing the trust deed by a sale of the house and lot. Therefore, Hollister and wife filed a joint answer and cross-bill, admitting the foregoing facts and claiming homestead rights in the premises. The original complainants demur, assigning for cause that the husband and wife having consented to the alienation of the property, the probate and privy examination being in due form, are estopped to claim homestead rights as against the beneficiaries in the trust deed. The questions raised are, whether the conveyance passed the homestead right, or estops the husband and wife, or either of them, to claim that right as against the parties entitled under the deed.

The constitution of 1870, art. xi, sec. 11 provides as follows: "A homestead in possession of each head of a family, and the improvements

thereon, to the value in all of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. Nor shall said property be alienated without the joint consent of husband and wife, when that relation exists." The act of 1870, 2d sess. ch. 80 § 1 (T. & S. Rev. 2114 *a*), substantially enacts these provisions into a law, with the additional requirement that the joint consent of husband and wife is "to be evidenced by conveyance duly executed as required by law for married women."

The argument in support of the demurrer to the cross-bill is based upon the assumption that the wife has no estate or interest in the property on which she and her husband reside, and the title to which is in him; that he, consequently, had the right to convey the property; and that the wife's consent to his conveyance, evidenced by her signature and privy examination, fulfills the requirement of the statute. It is conceded, that it might be otherwise if the wife had an estate or interest in the land by virtue of the homestead laws. The argument is vested mainly in the language used by Nicholson, C. J., in delivering the opinion of our supreme court in Hicks v. Pepper, published in the Commercial Reporter of March 16, 1874.

The point actually adjudged in that case was, that occupancy of the land as a residence was essential to the continuance of the homestead rights, and that, consequently, if the head of the family removed himself and family from the premises and established another residence, the land became at once subject to the claims of the husband's creditors, the title being in him. The learned judge, in delivering the opinion, says *arguendo:* "It was not intended by the act to alter or enlarge the title of the head of a family in the land in which the homestead exemption is secured. Whether the title is legal or equitable, it so continues in the head of a family during his life, unless alienated as provided by the constitution. As said by Judge Davis in Black v. Curran, 14 Wall. 469: 'It (the homestead exemption) can not, in an absolute sense, be said to be an estate in the land; the law creates none, and leaves the fee as it was before, but, in substance, declares that the right of occupancy shall not be disturbed while the homestead character exists.'" Both of these eminent judges had under consideration merely the effect of the homestead right on the pre-existing title, with a view to determine the rights of creditors after the homestead occupancy had been abandoned. The nature of the homestead right was not directly in issue. The conclusion reached is that the homestead laws do not change the title under which the land is held, that title, with its legitimate results, continuing as before. The further conclusion, that the homestead right ceases with the occupancy of the land as a homestead, such occupancy being the condition of its existence, is universally conceded by all the authorities. The question remains, and is directly raised by this record, what is the nature of the homestead right? It may not change the pre-existing title, but neither do the estates of dower and curtesy. It is, at least, "a local habitation and a name." Is it, also, an "airy nothing"?

"State or estate," says Lord Coke, "signifieth such inheritance, freehold, term for years, tenancie by statute merchant, staple, elegit, or the like, as any man hath in lands or tenements, etc." Co. Litt. 345, *a*. "Right," he adds, "doth include the estate in *esse* in conveyances; and, therefore, if tenant in fee simple make a lease for years, and release all his right in the land to the lessee and his heirs, the whole estate in fee simple passeth." "Title," he continues, "includeth a right also, as you shall preceive in many places in Littleton; and title is the mere general word; for every right is a title, but every title is not such a right for which an action lieth; and therefore *tituluo est justa causa possidendi quod nostrum est,* and signifieth the means whereby a man commeth to land, as his title is by fine or feoffment, etc." "Interest," he concludes, "*ex vi termini*, in legal understanding, extendeth to estates, rights and titles, that a man hath of, in, to, or out of, lands; for he is truly said to have an interest in them. And all these words singularly spoken are *nomina collectiva;* for by the grant of *totum statum suum* in lands, all his estates therein passe. *Et sic de cæteris.*" Co. Litt. 345 *b*.

It is plain, therefore, from our great master, that *status*, state or estate, is the most comprehensive word to express or pass an interest in land. Blackstone is equally explicit, for he says: "An estate in lands, tenants and hereditaments, signifies such an interest as the tenant has therein. It is called in Latin *status*, it signifying the condition, or circumstances in which the owner stands with regard to his property. * * An estate of freehold," he adds, "is defined by Britton to be 'the *possession* of the soil by a freeman.' And St. Germyn tells us, that 'the possession of the land is called in the law of England the franktenement or freehold.' Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, freehold." 2 Black. Com. 103, 104. Possession, then, or occupancy, is not only, as we are all taught, nine-tenths of the law, but one-tenth more of the estate, and is, to use my Lord Coke's *nomina collectiva*, "right, title, estate and interest." Nor is it less a right, title, estate and interest, because it may be put an end to by voluntary abandonment. For Blackstone tells us, that a qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A and his heirs, tenants of the manor of Dale; whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated. And the condition may be annexed to a freehold for life, as in the case of a woman who holds *durante viduitate.* Com. 109, 124.

Independent, then, of the title which the husband or wife may have in the land on which they fix their homestead, the statute gives to them, and to the wife, if she survive, in addition, a "right, title, estate or interest," a something, "the possession of the land," called in the law of England the franktenement or freehold. Something, not only given and protected by the law, but around which the ægis of the constitution is thrown. It may last for life, and is, therefore, according to all the definitions, a freehold not of inheritance. 2 Com. 121. Nay, it may continue, after the death of both parents, in the children until the youngest child comes of age. I should call it, if not in an absolute sense, yet in some sense, an estate.

In this state, where occupant rights have been recognized in the public lands from the earliest times, there can be no difficulty in conceiving all the attributes of an estate as attached to and dependant upon residence and possession. Such rights, which were expressly held to depend on residence and possession, (Kennedy v. Wiggins, 5 Hum. 125 and Kenner v. Montcastle, 5 Hum. 128), might be sold or assigned, and subjected to debts, and descended to heirs. Scott v. Price, 2 Head, 532; Knox v. Thomas, 5 Hum. 573. And, upon general principles, possession of land presumes a possessory title, and authorizes the person in possession to attack the title of the party by whom he is sought to be dispossessed. Williams v. Seawell, 1 Yer. 83; Marr v. Gilliam, 1 Cold. 488; Love v. Simms, 9 Wheat. 524.

That there is nothing in these views inconsistent with the rulings of our supreme court appears from the case of Williams v. Williams, 1 CENT. L. J. 479, decided at the April term, 1874, at Jackson, and after the decision of Hicks v. Pepper before cited. In that case it was held, that a conveyance of the homestead land by the husband, in whom was the legal title, was absolutely void so far as it affected the homestead right of the wife, and that the wife could come into equity to remove the same as a cloud upon her title. The opinion is also delivered by Nicholson, C. J., who uses the following language: "It is manifest from these constitutional and legislative provisions, that while possession of the homestead is the essential feature in the exemption from sale under legal process, or by the deed of the husband, the wife is recognized as having a present, subsisting and continuing interest in the maintenance and preservation of the benefits of their possession, *and that she has such a right in the land,* connected with the right of possession, that when that right is violated she is entitled to claim the protection of the courts." Such a right, if not an estate in an absolute sense, is one for all practical purposes.

Whatever we may call it, it is something which can not be alienated without the "joint consent" of husband and wife, "evidenced by conveyance as required by law for married women." The consent must be "joint," and evidenced, not by probate and privy examination, but by "conveyance," an actual grant by the wife as well as the husband. If the conveyance of the husband alone is void as to the wife's right, her assent to that conveyance will not give it vitality. There must be a joint conveyance by both, showing on its face that they undertake to convey, and do convey their "right, title, estate or interest" in the land. And there can, of course, be no estoppel on either by any other form of deed, the demurrer raising only the question of estoppel by the deed. Whether there might be an estoppel by facts coupled with the deed is not raised, and need not be considered.

The demurrer is not well taken, and must be overruled.

Right of Mortgagor to Income from Mortgaged Premises—Effect of Decree of Sale.

GILMAN *ET AL.* v. ILLINOIS AND MISSISSIPPI TELEGRAPH CO. *ET Al.*; COYKENDALL v. SAME.

Supreme Court of the United States, October Term, 1875.

1. Right of Mortgagor to Income from Premises.—Until the mortgagee takes possession, the mortgagor is entitled to all profits arising out of the mortgaged premises. A railway company has, therefore, the right to receive and control the earnings of the road until its mortgagees take possession or the proper judicial authority interposes.

2. Effect of Decree of Sale.—A decree of sale which is wholly silent as to the possession and earnings does not affect the case.

3. Refusal of Court to Wait for Evidence.—The refusal of the court below to give time for the production of further evidence is not reviewable.

Appeal from the Circuit Court of the United States for the District of Iowa.

Mr. Justice SWAYNE delivered the opinion of the court.

These cases have been argued together and will be decided together. The case last mentioned will be first considered.

On the 24th of May, 1872, the telegraph company recovered in the Circuit Court of the United States for the District of Iowa a judgment for the sum of $23,734.04 and costs. On the 13th of June following execution was issued. The marshal to whom the process was directed, on the 16th of that month, served it by attaching as garnishees several persons, one of whom was Coykendall, the plaintiff in error. On the 27th of October, 1873, he filed his answer, and on the 27th of October, 1874, he filed a further answer.

By the first answer he admitted that since he was garnisheed he had received for and paid over to the railroad company more than $87,000. In his second answer he set forth that he was the agent of the railroad company at Des Moines, and that his duties were to sell tickets and receive and ship freight and to receive the charges upon such freight. For the moneys received, both for tickets and freight, a large proportion belonged to other companies, but how much he did not know. All the

moneys he received were regularly transmitted to the assistant treasurer of the Des Moines company.

The proper apportionment of the moneys was made by the officers of that company at Keokuk, and the Des Moines company was accountable to the other companies for what belonged to them. He was not in the employment of any other company or person during the time mentioned, and was not responsible to any other company or person for the moneys which he received, as before stated.

The gross amount received by him, between the time he was garnisheed and the appointment of the receiver who took possession of the road, was $27,000.

The case was submitted to the court and argued by the counsel upon both sides. The next day it was stated to the court by the counsel for the defendant that proof could be adduced of the proportion of the moneys in question which belonged to other companies, and time was asked to procure it. The application was overruled, and the court gave judgment for $27,000 and costs. The garnishee thereupon excepted to the ruling of the court refusing further time.

The case having been submitted to the court and argued by the counsel of both parties, the garnishee not asking for a jury, the record in this respect shows no error. It is to be taken that both parties waived a trial by jury, and they are bound accordingly. Phillips v. Preston, 5 How. 278; Campell v. Boyreau, 21 How. 224; Kelsey v. Forsythe, Id. 86. The proceeding not having been according to the act of March 3, 1865, this court has no power to examine any ruling of the court below excepted to during the progress of the trial. Campbell v. Boyreau, *supra;* Guild and others v. Fontin, 18 How. 135; Kearney v. Case. 12 Wall. 275; Dickenson v. The Planters' Bank, 16 Id. 251. The only point attempted to be presented by the bill of expectations was the refusal of the court to give time for the production of further evidence. If this subject was before us in such a shape that we could consider it, it would be a conclusive answer that the matter was one resting in the discretion of the court. Its determination, therefore, could not be reviewed by this tribunal.

The judgment of the circuit court is affirmed.

This brings us to the examination of the case in equity.

The bill was filed to prevent, by injunction, the collection of the moneys upon which the judgment in favor of the telegraph companies was founded. There is no controversy between the parties as to the facts.

On the 16th of Feburary, 1857, the railroad company, by its then corporate name, executed a mortgage, and on the 1st of October, 1868, by its corporate name as altered, executed another. Both were given to secure the payment of its bonds, as set forth. A part of the premises described and pledged by both mortgages, besides the road, was its income.

In case of default in the payment of interest or principal the mortgagees were authorized to take possession and collect and receive the income and earnings of the road and apply them to the debts secured, and upon the request of one-third of the bondholders to sell the mortgaged premises.

The conditions of both mortgages having been broken, the mortgagees in the second mortgage filed their bill of foreclosure in the Circuit Court of Polk county, in the state of Iowa. The mortgagees in the second mortgage, various judgment and lien creditors, among the former the telegraph company, were made defendants. On the 31st of May, 1873, a decree of foreclosure and sale was rendered. It fixed the priorities of the several parties, and held that the judgment of the telegraph company was a lien subject to the mortgage in suit and other specified liens. It ordered a sale of the mortgaged property. The road was still in possession of the company. The decree made no provision for disturbing their possession, and none whatever as to the income of the road between the time of the decree and the time of the sale. The telegraph company proceeded, as we have stated, in disposing of the case at law. On the 20th of June, 1873, the appellants, who are the trustees in the two mortgages, filed this bill. On the 9th of September, 1873, after the sheriff had advertised the mortgaged premises for sale, the decree in the state court was amended by providing for the appointment of "a special receiver of all the income and earnings of the road" between the date of the decree and the time fixed by the sheriff for the sale to be made by him. This was done with a saving of the rights of the telegraph company. The special receiver took possession on the 15th of September, 1873. The sale by the sheriff was made on the 17th of October, 1873. The road was operated by the company up to the time when the receiver took possession. During this period the fund was received for which judgment was given against Coykendall.

The proceedings in the case at law having been held valid, the telegraph company is entitled to the fund in controversy, unless the appellants have shown a better right to it. The question arises upon the mortgages. The civil law is the springhead of the English jurisprudence upon the subject of these securities. Originally, according to that jurisprudence, mortgages of the class to which those here in question belong, vested the fee, subject to be divested by the discharge of the debt at the day *limited* for its payment. If default was then made the premises were finally lost to the debtor. In the progress of time more liberal views prevailed, and the debt came to be considered as the principal thing and the motgage only as an incident and security. In the present state of the law, where there is no prohibition by statute, it is competent for the mortgagee tot pursue three remedies at the same time. He may sue on the note or obligation, he may bring an action of ejectment, and he may file a bill for foreclosure and sale. 1 Hilliard on Mort. 9, 62; Id. 104, 111; Andrews v. Sutton, 2 Bland, 665.

The remedy last mentioned was resorted to in the state court by the mortgagees in the second mortgage, those in the first having been made parties, and that mortgage thus brought before the court. That court, therefore, had full jurisdiction as to the rights of all the parties touching both instruments. It would have been competent for the court *in limine*, upon a proper showing, to appoint a receiver and clothe him with the duty of taking charge of the road and receivings its earnings, with such limit of time as it might see fit to prescribe. It might have done the same thing subsequently, during the progress of the suit. When the final decree was made, a receiver might have been appointed and required to receive all the income and earnings until the sale was made and confirmed and possession delivered over to the vendee.

Nothing of this kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the meantime. It follows that neither, during that period, was in anywise affected by the action of the court. They were as if the decree were not.

As regards the point under consideration, the decree may, therefore, be laid out of view. The stipulation renders it necessary to consider the amendment to the decree. Without that stipulation, the result would have been the same. It could not affect rights which had attached before it was made. Nothing was done in the exercise of the right which the mortgages gave to the mortgagees to intervene and take possession. We may, therefore, lay out of view also both these topics.

This leaves nothing to be examined but the effect of the mortgages, irrespective of any other consideration.

A mortgagor of real estate is not liable for rent while in possession. 2 Kent's Com. 172. He contracts to pay interest, and not rent. In Chinnery v. Black, 3 Doug. 391, the mortgagor of a ship sued for freight earned after the mortgage was given, but unpaid. Lord Mansfield said: "Until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profit made." It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things, the whole fund belonged to the company and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist. They in no wise affected it. If the mortgagees were not satisfied they had the remedy in their own hands. They could at any moment invoke the aid of the law or interpose themselves without it. They did neither.

In The Galveston Road v. Cowdry, 11 Wall. 482, substantially the same question arose as that we are considering. The mortgage there contained provisions touching the income of the road similar to those in the mortgages before us. This court held that, at least until after a regular demand was made, those who received the earnings were not bound to account for them. See, also, The City of Bath v. Miller, 51 Maine, 341; Noyes, Receiver, v. Rich, 52 Maine, 115.

Upon both reason and authority we think the appellants have no right to the fund in controversy.

The decree of the circuit court is affirmed.

Constitutional Law—Construction of Revenue Act.

B. & M. R. R. v. LANCASTER COUNTY.

Supreme Court of Nebraska.

Hon. GEORGE B. LAKE, Chief Justice.
" SAMUEL MAXWELL, } Judges.
" DANIEL GANTT, }

1. Constitutional Law—Uniformity.—A statute authorizing a tax "to be paid in money or labor at the rate of two dollars per day, at the option of the person taxed," is not void under the state constitution; nor is it void for want of uniformity, because it is not assessed against lots in cities and towns, or property occupied as right of way by railroad companies.

2. Legislative Discretion.—Although the legislature in framing the statute may have apportioned the tax without regard to principles of equity, their action is not subject to judicial interference.

3. Construction of Word "Land."—The word "land," as used in the act, does not include town and city lots, or right of way of railroad companies, but land lying within the limits of a town or city, and not subdivided, is within the meaning of the term.

4. Construction of Word "Rate."—The word "rate," as used in the act prescribing a "land tax in any *rate* not exceeding four dollars to the quarter section," means that a quarter section being taken as the unit of quantity, whatever may be the ratio between it and the tax placed thereon, the same relative proportion must be observed as to any other quantity, either more or less, that falls within the appointment.

5. Notice to Non-residents.—Failure to give notice of time and place, when and where the tax may be worked out, will not release the land from the lien of such tax.

6. Record—Tax Duplicate.—If the records of a school district fail to show that the tax voted is one which they are authorized by law to levy, it can not be enforced. But the mere failure in the tax duplicate to particularize all the uses

to which the money is to be applied will not invalidate the levy. The several items may be properly included under the head of "district school tax."

LAKE, C. J., delivered the opinion of the court.

This case is brought here as an original proceeding, to test the legality of certain taxes levied upon the plaintiff's lands, and which the county treasurer threatens, and is about to collect by a seizure and sale of its property, as he is directed by law to do.

Relief is sought against two distinct kinds of taxes, the first in order being what is known as the land road tax, and the second, those which were supposed to have been voted in the several school districts of the county, and were certified to the county clerk for entry upon the tax duplicate.

By a stipulation, the facts of the case are all agreed upon. As to these, therefore, we can have no trouble, and it only remains for us properly to apply the law applicable thereto, and this determines whether or not the plaintiff is entitled to the relief praved.

And first of the road tax. The objection urged against its validity is radical, goes to the very foundation on which it rests. No infirmity is claimed to exist in consequence of any omission of duty on the part of any officer charged with the levy, or the collection of taxes, but it is asserted that the statute which directed its imposition was unauthorized and void. This statute, section 30 of the revenue act, among other things, provides "for roads a poll tax of two dollars or one day's work, and a land tax in any rate not exceeding four dollars to the quarter section, to be paid in money, or in labor, at the rate of two dollars per day, at the option of the person so taxed."

Three distinct objections are made to this tax: first, that it lacks uniformity; second, that there was no necessity for the tax; and, third, that no provision is made for notice to non-resident land owners as to when and where such tax may be worked out, which, as to residents, is required to be given.

Our attention has been directed to a large number of authorities which support the position taken by plaintiff's counsel, that a specified tax, or in other words, a tax rated by the acre, or superficial area, is unauthorized, and can not be enforced. But we have found, without a single exception, that in those states where it has been so held, there is some constitutional restraint put upon the power of the legislature, whereby the burdens of the government are required to be imposed in some particular manner, and in respect of which they are left no discretion whatever. For instance, in Ohio where the new constitution declares that "laws shall be passed taxing by a uniform rule all moneys, credits, etc.," and also "all real and personal property, according to its true value in money," it was held that while under the former constitution of that state which contained no similar provision, there was no restraint upon the legislative will in this respect, and "the whole matter of taxation was committed to the discretion of the general assembly," and that the levies "might be made upon such property, and in such proportion as that body saw fit," under the provision above quoted; this no longer could be done, and this positive injunction must be obeyed. Zanesville v. Richards, 5 O. S. 589. So, too, in Georgia, a constitutional provision that taxation shall be *ad valorem* precludes the taxation of cattle by the head. Livingston v. Albany, 41 Geo. 21. And in several other states we find similar checks upon the discretion of the legislature, but for which that body is the sole judge of the necessity for, and the extent of taxation, and also of the sources from whence the revenues shall be drawn. Scofield v. Cleveland, 1 O. S. 126; Hill v. Higdon, 5 O. S. 243; Gordon v. Carnes, 47 N. Y. 603.

The principal point urged on the argument under the head of want of uniformity is, that the tax is for a public purpose, to be expended throughout the county, and yet is imposed only upon a portion of the taxable property therein, not even upon all the real estate within the limits of the county, which in respect of this tax is to be regarded as a single taxing district.

It is true, that it is not the practice to impose it upon town or city lots; nor does the law contemplate that it shall be so levied. We think a fair, reasonable construction of the several sections of the revenue act warrants this conclusion. It is true, that the word "land," in its most comprehensive sense, would include town lots, and in fact every other portion of the earth's surface within the county. But this, evidently, is not the meaning here intended. In other sections of the revenue act we find specific exemptions of real property from the burdens of taxation, which the legislature, understandingly, were authorized to make. So, too, in section 34, direction is given to the county clerk as to what the tax lists must contain, their order, etc. In the second passage it provides that "all the taxable lands in the county" shall be included; and, in the third paragraph, that "all the city or town lots in each city or town in the county" shall be given.

Again, in section 17 provision is made for the taxation of the road-bed and other property of railroad companies, and also, certain property of other corporate bodies. And the last clause of this section declares that: "Any real estate belonging to, or represented by, the capital stock of any corporation * * * shall be omitted by the assessor from the return of taxable lands and town lots."

Here we have the word "lands" used in connection with, and in contradistinction to, "town lots," which but strengthens our conviction that the term "land tax," as used in section 30, neither town nor city lots, nor lands lawfully occupied for right of way by railroad companies, were designed to be included. But we think the words do include all other real property in the county not otherwise specially exempted from its operation, whether lying within the corporate limits of a city or town, or not. In the case of lands lying within a city or town, and not subdivided into lots, they are clearly within the operation of the statute, and subject to the tax. It is quite manifest that this tax is required to be imposed upon all of a certain class within the county, by whomsoever it may be owned, unless falling within some of the authorized exemptions. It reaches all that comes within the meaning of the word "lands," in the restricted sense in which it is here used. This may be properly designated the "selection" of the kind and class of property upon which this burden shall rest. And this, when taken in connection with the "rate," or rule by which the levy must be made completes the legislative apportionment which is of the essence of a valid tax.

But, say the plaintiff's counsel, this apportionment is according to no just rule; it is arbitrary, and acts oppressively. It imposes like burden upon all, whether they be worth three, or three hundred dollars per acre, This is all true, and hopeless indeed would be the task to undertake to show that such legislation is founded upon any fair rule or equitable principle whatever. These are considerations which, under the constitution in force when the taxes complained of were levied, could only be properly addressed to the legislature. It was for that body, not the courts, to determine what the rule of apportionment should be. The People v. The Mayor, 4 Const. 419; N. M. R. R. Co. v. McGuire, 49 Mo. 490; Powers *In re.*, 25 Vt. 261.

It was contended in argument, however, that if the law should be upheld, then it was evident that the word "rate," as used in connection with this tax, should be construed as meaning a per centage on the valuation of the land, so that the amount of tax levied upon each particular tract should be proportioned strictly according to its assessed value. There is no doubt that in many places in the revenue act, this word is used in the sense here claimed for it, and that where such is the case an *ad valorem* assessment or levy is imperatively required. But in this connection it is manifestly susceptible of a different meaning—of the one which has obtained in practice, viz: that a legal subdivision of land known as a quarter section, or one hundred and sixty acres, being taken as the unit of quantity, whatever may be the ratio between it and the tax placed thereon, the same relative proportion must be observed as to any other quantity, either more or less, that falls within the apportionment. This, it seems to us, is the only rational construction that can possibly be given to the language here employed..

For these reasons we must hold that under the constitution in force, when this tax was imposed it was a valid levy. And although we may think that, in framing the statute in question, there was a manifest lack of wisdom, and a failure to recognize those just and equitable principles which ought to obtain in the apportionment of all the burdens of government, this is no cause for judicial interference. It is a matter which, until our new constitution went into operation, was left entirely to the judgment and discretion of the legislature, to which body alone applications for relief could properly be addressed.

There were several other minor objections urged in this argument, but not mentioned in the petition as grounds of complaint, which we have not considered it necessary to notice at any length. For instance, that in certain of the road districts no expenditure of money or labor was necessary for the purposes to which this tax is devoted, and that at least one-third of the levy could, at the option of the commissioners, be expended outside of the particular road district where raised. These are matters entirely within the control of the legislature, and with which the courts can have nothing whatever to do. The tax should be regarded, and in truth is, a county levy; it is the same in all the road districts. These districts are created, not as special and distinct taxing districts, but rather to insure a more equal and economical expenditure of the funds raised for road purposes than could be expected if this were entrusted entirely to the county commissioners, or to a single road supervisor elected for the whole county. The same is true, also, in respect of the provision found in section 8 of the road act, requiring each road supervisor to notify all persons owning lands, and living within his district, as to when and where such tax could be worked out, while no notice is provided for non-resident owners. The validity of this tax does not depend upon this notice being given. This is a regulation by which it was intended quite as much to insure the proper improvement of highways as to favor or benefit the land owner. If observed, it operates upon all within the jurisdiction of the supervisor, upon those whom it would be reasonable to suppose were in a situation, and might desire to work out the tax. But if the tax be not worked out, even although the supervisor failed to give the proper notice, payment must be made in money. And nothing but the production of the certificate of the proper supervisor, of labor having been actually performed, can justify the treasurers in not making the collection, or will operate as a release of the tax. The statute authorized the plaintiffs to work out these taxes by labor performed upon the highways, and had it appeared that timely offers to do so had been made to the proper supervisors, the result might have been different.

As to the second class of taxes against which relief is sought, in the view we take of the petition, a very few words will be all that is necessary.

While we are very strongly inclined to the opinion that, inasmuch as the powers of school districts, and school boards, are purely delegated, exceedingly limited, and strictly defined in the statutes granting them, if their records fail to show that a tax voted is one which they are authorized to levy, its collection can not be enforced; yet the case as made by the petition is not brought within the operation of this rule. There is no allegation that such is the case in respect of the taxes in question, and in the absence of such allegation the legal presumption is that the facts would not warrant it.

The allegations of the petition on this are confined to what is shown by tax duplicate, and the reports sent up to the county clerk by the district boards. There is no reference made to what was done, or omitted,

by the several districts, or the district boards, in the imposition of a single tax. Where there is an omission to state a material fact, one necessary to show a cause of action, the presumption against the pleader is that it does not exist.

With respect to the formality of the tax duplicate, we take the law to be, that the mere failure to particularize all the uses to which the money is to be applied, will not necessarily invalidate the levy. Indeed, the form prescribed in section 36 of the revenue act seems to comtemplate that the several items may be properly included under the head of "district school tax." So, too, of the report required to be made by the district board of taxes voted in the districts, especially as to those authorized by section 32 of the school law, we do not think that it was intended, nor would it be reasonable to require that an itemized statement be given of the purposes for which the funds were intended. It certainly could be of no practicable use whatever, and the omission to do so could work no possibly injury to any one. By section 44 of the school law, the director is required to keep a record of all the "proceedings of the district in a book to be kept for that purpose," and it is to this, and this alone, resort must be had to ascertain what the district has done, what taxes have been voted, and for what particular purpose they were levied. Cooley on Taxation, 247, and cases there cited.

For these reasons the preliminary injunction heretofore allowed must be dissolved and the case dismissed at the plaintiff's cost.

Removal of Causes from State to Federal Courts.

GAINES v. FUENTES *ET AL.*

Supreme Court of the United States, No. 104, October Term, 1875.

1. **General Power of Congress over the Subject.**—In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different states, it rests with Congress to determine at what time the power may be invoked and upon what conditions; whether originally in the federal court, or after suit brought in the state court; and in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error.

2. ——. As the constitution imposes no limitation upon the class of cases involving controversies between citizens of different states, to which the judicial power of the United States may be extended, Congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.

3. ——. **May Authorize Removal of Cause of which the Federal Court could not, Originally, have taken Cognizance.**—The act of Congress of March 2d, 1867, in authorizing and requiring the removal to the Circuit Court of the United States of a suit pending or afterwards brought in *any* state court involving a controversy between a citizen of the state where the suit is brought and a citizen of another state, thereby invests the circuit court with jurisdiction to pass upon and determine the controversy, when the removal is made, though that court could not have taken original cognizance of the case.

4. **Removal of Suit to Annul a Will.**—A suit to annul a will as a muniment of title and to restrain the enforcement of a decree admitting it to probate, is in essential particulars a suit in equity, and if by the law obtaining in a state, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the Circuit Court of the United States, if the parties are citizens of different states.

In error to the Supreme Court of the State of Louisiana.

Mr. Justice FIELD delivered the opinion of the court.

This is an action in form to annul an alleged will of Daniel Clark, the father of the appellant, dated on the 13th of July, 1813, and to recall the decree of the court by which it was probated. It was brought in the second district court for the parish of Orleans, which, under the laws of Louisiana, is invested with jurisdiction over the estates of deceased persons, and of appointments necessary in the course of their administration.

The petition sets forth that on the 18th of January, 1855, the appellant applied to that court for the probate of the alleged will; and that by decree of the supreme court of the state the alleged will was recognized as the last will and testament of the said Daniel Clark, and was ordered to be recorded and executed as such; that this decree of probate was obtained *ex parte*, and by its terms authorized any person at any time, who might desire to do so, to contest the will and its probate in a direct action, or as a means of defence by way of answer or exception, whenever the will should be set up as a muniment of title; that the appellant subsequently commenced several suits against the petitioners in the circuit court of the United States to recover sundry tracts of land and properties of great value, situated in the parish of Orleans and elsewhere, in which they are interested, setting up the alleged will as probated as a muniment of title, and claiming under the same as instituted heir of the testator; and that the petitioners are unable to contest the validity of the alleged will so long as the decree of probate remains unrecalled. The petitioners then proceed to set forth the grounds upon which they ask for a revocation of the will and the recalling of the decree of probate, these being substantially the falsity and insufficiency of the testimony upon which the will was admitted to probate, and the status of the appellant, incapacitating her to inherit or take by last will from the decedent.

A citation having been issued upon the petition and served upon the appellant, she applied in proper form, with a tender of the necessary bond, for removal of the cause to the Circuit Court of the United States for the District of Louisiana, under the twelfth section of the judiciary act of 1789, on the ground that she was a citizen of New York and the petitioners were citizens of Louisiana. The court denied the application, for the alleged reason that, as the appellant had made herself a party to the proceedings in the court relative to the settlement of Clark's succession by appearing for the probate of the will, she could not now avoid the jurisdiction when the attempt was made to set aside and annul the order of probate which she had obtained. The court, however, went on to say in its opinion that the federal court could not take jurisdiction of a controversy having for its object the annullment of a decree probating a will.

The appellant then applied for a removal of the action under the act of March 2d, 1867, on the ground that from prejudice and local influence she would not be able to obtain justice in the state court, accompanying the application with the affidavit and bond required by the statute. This application was also denied, the court resting its decision on the alleged ground, that the federal tribunal could not take jurisdiction of the subject-matter of the controversy.

Other parties having intervened, the applications were renewed and again denied. An answer was then filed by the appellant, denying generally the allegations of the petition, except as to the probate of the will, and interposing a plea of prescription. Subsequently a further plea was filed to the effect that the several matters alleged as to the status of the appellant had been the subject of judicial enquiry in the federal courts, and been there adjudged in her favor. Upon the hearing a decree was entered annulling the will and revoking its probate. The supreme court of the state having affirmed this decree, the case was appealed to this court.

In the view we take of the application of the appellant to remove the cause to the federal court, no other question than the one raised upon that application is open for our consideration. If the application should have been granted, the subsequent proceedings were without validity, and no useful purpose would be obtained by an examination of the merits of the defence, upon the supposition that the state court rightfully retained its original jurisdiction.

The action, as already stated, is in form to annul the alleged will of Daniel Clark of 1813, and to recall the decree by which it was probated. But as the petitioners are not heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in place of the appellant, the action can not be treated as properly instituted for the revocation of the probate, but must be treated as brought by strangers to the estate against the devisee to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property. It is in fact an action between parties; and the question for determination is, whether federal courts can take jurisdiction of an action brought for the object mentioned between citizens of different states, upon its removal from a state court. The constitution declares that the judicial power of the United States shall extend to "controversies between citizens of different states," as well as to cases arising under the constitution, treaties and laws of the United States; but the conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the constitution, are matters of legislative direction. Some cases there are, it is true, in which, from their nature, the judicial power of the United States, when invoked, is exclusive of all state authority. Such are cases in which the United States are parties; cases of admiralty and maritime jurisdiction, and cases for the enforcement of rights of inventors and authors under the laws of Congress. The Moses Taylor, 4 Wallace, 429; Railway Co. v. Whitton, 13 Ib. 288. But in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different states, it rests entirely with Congress to determine at what time the power may be invoked and upon what conditions; whether originally in the federal court, or after suit brought in the state court; and in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error. The judiciary act of 1789, in the distribution of jurisdiction to the federal courts, proceeded upon this theory. It declared that the circuit courts should have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, involving a specified sum or value, were the suits where between citizens of the state in which they were brought and citizens of other states; and it provided that suits of that character by citizens of the state in which they were brought might be transferred, upon application of the defendants, made at the time of entering their appearance, if accompanied with sufficient security for subsequent proceedings in the federal court. The validity of this legislation is not open to serious question, and the provisions adopted have been recognized and followed with scarcely an exception by the federal and state courts since the establishment of the government. But the limitation of the original jurisdiction of the federal court, and of the right of removal from a state court, to a class of cases between citizens of different states involving a designated amount, and brought by or against resident citizens of the state, was only a matter of legislative discretion. The constitution imposes no limitation upon the class of cases involving controversies between citizens of different states, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.

As we have had occasion to observe in previous cases, the provision of the constitution, extending the judicial power of the United States to controversies between citizens of different states, had its existence in the impression that state attachments and state prejudices might affect injuriously the regular administration of justice in the state courts. It was originally supposed that adequate protection against such influences

was secured by allowing to the plaintiff an election of courts before suit, and when the suit was brought in a state court, a like election to the defendant afterwards. Railway Co. v. Whitton, 13 Wallace, 289. But the experience of parties immediately after the late war, which powerfully excited the people of different states, and in many instances engendered bitter enmities, satisfied Congress that further legislation was required fully to protect litigants against influences of that character. It therefore provided, by the act of March 2d, 1867 (14 Statutes, 559), greater facilities for the removal of cases involving controversies between citizens of different states, from a state court to a federal court, when it appeared that such influences existed. That act declared that where a suit was then pending, or should afterwards be brought in *any* state court, in which there was a controversy between a citizen of the state in which the suit was brought, and a citizen of another state, and the matter in dispute exceeded the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether plaintiff or defendant, upon making and filing in the state court an affidavit that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the state court, might at any time before final hearing or trial of the suit, obtain a removal of the case into the Circuit Court of the United States upon petition for that purpose and the production of sufficient security for subsequent proceedings in the federal court. This act covered every possible case involving controversies between citizens of the state where the suit was brought, and citizens of other states, if the matter in dispute, exclusive of costs, exceeded the sum of five hundred dollars. It mattered not whether the suit was brought in a state court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the state and citizens of other states, and did the matter in dispute exceed a specified amount. And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination.

With these provisions in force, we are clearly of opinion, that the State Court of Louisiana erred in refusing to transfer the case to the Circuit Court of the United States upon the application of the appellant. If the federal court had, by no previous act, jurisdiction to pass upon and determine the controversy existing between the parties in the Parish Court of Orleans, it was invested with the necessary jurisdiction by this act itself, so soon as the case was transferred. In authorizing and requiring the transfer of cases involving particular controversies, from a state court to a federal court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases. The language used in Smith v. Rines, cited from the 2d of Sumner's Reports, in support of the position that such cases are only liable to removal from the state to the circuit court as might have been brought before the circuit court by original process, applied only to the law as it then stood. No case could then be transferred from a state court to a federal court on account of the citizenship of the parties, which could not originally have been brought in the circuit court.

But the admission supposed is not required in this case. The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief, of the nature here sought, are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are on the one side citizens of Louisiana, and on the other citizens of other states.

Nor is there anything in the decisions of this court in the case of Gaines v. New Orleans, reported in the 6th of Wallace, or in the case of Broderick's will, reported in the 21st of Wallace, which militate against these views. In Gaines v. New Orleans this court only held that the probate could not be collaterally attacked, and that until revoked it was conclusive of the existence of the will and its contents. There is no intimation given that a direct action to annul the will and restrain a decree admitting it to probate might not be maintained in a federal as well as in a state court, if jurisdiction of the parties was once rightfully obtained.

In the case of Broderick's will, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the state courts of equity by statute, is there recognized, and that when so vested the federal courts, sitting in the states where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties.

There are, it is true, in several decisions of this court, expressions of opinion that the *federal courts have no probate jurisdiction, referring particularly to the establishment of wills*, and such is undoubtedly the case *under the existing legislation of Congress*. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances no such controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is offered or of other states. From its nature and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states, of which the federal courts have concurrent jurisdiction with the state courts under the judiciary act. But whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

But, as already observed, it is sufficient for the disposition of this case that the statute of 1867, in authorizing a transfer of the cause to the federal court, does, in our judgment, by that fact, invest that court with all needed jurisdiction to adjudicate finally and settle the controversy involved.

It follows from the views thus expressed that the judgment of the Supreme Court of Louisiana must be reversed, with directions to reverse the judgment of the Parish Court of Orleans, and to direct a transfer of the cause from that court to the Circuit Court of the United States, pursuant to the application of the appellant; and it is so ordered.

Mr. Justice BRADLEY dissenting.

The question whether the proceeding in this case, which was instituted in the state court of probate, was removable thence into the Circuit Court of the United States, depends upon the true construction of the acts of Congress which give the right of removal. The first act on this subject was the twelfth section of the judiciary act of 1789; which declares "that if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state," [and certain conditions and security specified in the act be performed and tendered] "it shall be the duty of the state court to * * * proceed no further in the cause, * * * which shall then proceed in the United states court 'in the same manner as if it had been brought there by original process.'" This 12th section can not be entirely understood without reference to the preceding section, by which the original jurisdiction of the circuit court was conferred. That section declares that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state; * * * but that "no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

Now, the question arises, what proceedings are meant by the phrase, "suits of a civil nature at common law or in equity," in the latter section, conferring original jurisdiction, and the phrase "a suit," in the former section, giving the right of removal. A "suit of a civil nature at common law or in equity," may by virtue of the 11th section be brought in a circuit court if the parties are citizens of different states, and one of them is a citizen of the state where the suit is brought. "A suit" commenced in any state court by a citizen of that state against a citizen of another state may be removed into the circuit court; and when removed, it is directed that "the cause shall then proceed in the same manner as if it had been brought there by original process." By this act, therefore, any "suit" which could have been originally brought in the circuit court, may be removed there from the state court, if brought by a citizen of the state against a citizen of another state. And it was always supposed that if it could not be originally brought there, it could not be removed there; because it is to be proceeded in "as if it had been brought there by original process." Mr. Justice Story, in a case before him, decided in 1836, in reference to this section used the following language: "It is apparent from the language of the closing passage of the section above quoted, that it contemplates such cases, and such cases only, to be liable to removal, as might under the law, or at all events under the constitution, have been brought before the circuit court by original process." Judge Conklin, in his Treatise on the United States Courts, a work long used with approbation by the profession, says: "It is obvious from the language of the twelfth section of the judicial act, that it was not intended by it to extend the jurisdiction of these courts over causes brought before them on removal, beyond the limits prescribed to their original jurisdiction, and such, as far as it goes, is the judicial construction which has been given to this section." Congress, undoubtedly, might authorize, and in special cases, has authorized the removal of causes from state courts to the United States court which could not have been originally brought in the latter. An instance of the kind is found in this very twelfth section, in the special case where a suit respecting the title to land has been commenced in a state court between two citizens of the same state, and one of the parties before the trial states to the court by affidavit that he claims title under a grant from another state. In Bushnell v. Kennedy, 9 Wall. 387, however, this court held, that a citizen of one state sued in another state by a citizen thereof, on a claim which had belonged to a citizen of the latter state, and had been assigned to the plaintiff, might have the cause removed to the Circuit Court of the United States, although, perhaps, it might not have been originally cognizable therein; but it still remains to determine what kinds of controversies are intended by the act.

Now, the phrase, "suits at common law and in equity" in this section, and, the corresponding term "suit" in the twelfth, are undoubtedly of very broad signification, and can not be construed to embrace only ordinary actions at law, and ordinary suits in equity; but must be construed to embrace all litigations between party and party which in the English system of jurisprudence, under the light of which the judiciary act, as well as the constitution, was framed, were embraced in all the various forms of procedure carried on in the ordinary law and equity courts—as distinguished from the ecclesiastical, admiralty and military courts of the realm. The matters litigated in these extraordinary courts are not by a fair construction of the judiciary act, embraced in the terms "suit at law or in equity," or "suit," unless they have become incorporated with the general mass of municipal law, and subjected to the cognizance of the ordinary courts.

Now, it is perfectly plain, that an application for the probate of a will is not such a subject as is fairly embraced in these terms. This court has in repeated instances expressly said that the probate of wills and administration of estates, does not belong to the jurisdiction of the federal courts under the grant of jurisdiction contained in the judiciary act. And it may, without qualification, be stated, that no respectable authority in the profession, or on the bench, has ever contended for any such jurisdiction. Whether, after a will is proposed for probate, and a *caveat* has been put in against it, and a *contestatio litis* has thus been raised, and a controversy instituted *inter partes*, Congress might not authorize the removal of the cause for trial to a federal court, where the parties *pro* and *con*, are citizens of different states, is not now the question. The question before us is, whether Congress has ever done so. And it seems to me that it has not. The controversy is not of that sort or nature which belongs to the category of a suit at law or in equity, as those terms were used in the judiciary act.

It is not intended to say, that the validity of a will may not often come in question and require adjudication, in both a court of law and a court of equity. It does come in question frequently. *Devisavit vel non* is an issue frequently made at law and directed in equity, and there are special cases also, where the validity of a will may be investigated in equity, as shown in the case of Broderick's Will, lately decided by this court. But that is a very different thing from hearing and determining a question of probate, even when the question becomes a litigated one. This question belongs to special courts, having a special mode of procedure, and is subject to rules that took their origin in the ecclesiastical laws. And it certainly can not be seriously contended that, if the federal courts have no jurisdiction of the probate of wills, they nevertheless have jurisdiction of proceedings to revoke the probate. This would be to assume the whole jurisdiction of the subject.

The proceeding in the case below was one to revoke the probate of a will—simply that and nothing more. It was not merely to set aside the will so far as it affected the complainants. Not at all. It brought up the question of probate under a form of proceeding peculiar to the course of justice in Louisiana, called an action of nullity. This action may, undoubtedly, be entertained in the federal courts in that state, at all events, to set aside their own judgments. But can it be entertained when the object is to revoke the probate of a will, by a decree to annul the judgment of probate? That is the precise question to be determined here.

It is contended, however, that the act of March 2d, 1867, which gives the right of removal to the federal court, of a suit in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, where the latter makes affidavit that he has reason to, and does believe that, from prejudice or local influence, he will not be able to obtain justice in the state court, extends the jurisdiction of the circuit court to cases of every kind of controversy which may be litigated between parties. But I can not perceive any such intention in the act. There is no indication that the jurisdiction of the federal court was meant to be extended to any class of cases to which it did not extend before. It authorizes the removal at any time before trial, and gives the right to the plaintiff as well as the defendant. These are the only changes that seem to have been in the mind of Congress.

If it is desirable that the right of removal should be extended to cases like the present, it is easy for Congress to legislate to that effect. Until it does so, in my judgment, the right does not exist. Perhaps, it is desirable that the law should be as the appellant contends it is; but it is not for the court to make the law, but to declare what law has been made. I can not free myself from the conviction that the decision of the court in this case is based rather upon what it is deemed the law should be, than upon a sound construction of the statutes which have been actually enacted.

In my opinion the judgment of the Supreme Court of Louisiana ought to be affirmed.

Mr. Justice Swayne concurred in this dissenting opinion.

Chief Justice Waite also dissented from the judgment of the court.

—IS A MAN'S HOUSE HIS CASTLE?—The old saying that "a man's house is his castle," and to which John Bull has always been particularly fond of giving utterance, seems to be about to fail—like many other of his hereditary ideas. There is, it appears, a statute in England which provides that if a person be found drunk in a licensed house, the landlord is punishable. A short time ago a landlord of an inn was himself drunk in bed, and, a police officer going up-stairs and finding him so, he was fined by the magistrates. An English writer manfully contends for the right of the landlord to be drunk in his own inn, on the principle that *domus sua cuique est tutissimum refugium.*

Land Grant—Power of Legislature to Declare Forfeiture.

FARNSWORTH v. MINNESOTA AND PACIFIC R. R. *ET AL.*

Supreme Court of the United States, October Term, 1875.

1. Land Grant—Condition Precedent.—On the 3d of March, 1857, Congress passed an act granting certain lands to the Territory of Minnesota, for the purpose of aiding in the construction of several lines of railroad between different points in the territory. The act declared that the lands should be exclusively applied to the construction of that road on account of which they were granted, and to no other purpose whatever, and that they should be disposed of by the territory or future state only as the work progressed, and only in the manner following: that is to say, a quantity of land, not exceeding one hundred and twenty sections for each of the roads, and included within a continuous length twenty miles of the road, might be sold, and when the governor of the territory or the future state should certify to the secretary of the interior that any continuous twenty miles of any of the roads were completed, then another like quantity of the land granted might be sold; and so from time to time until the roads were completed: *Held*, that the construction of portions of the road on account of which lands were granted as thus designated, was a condition precedent to a conveyance by the territory or future state of any of the lands beyond the first one hundred and twenty sections. Accordingly, an act of the territory transferring to a railroad company these lands in advance of any work on its road, only conveyed title to the first one hundred and twenty sections.

2. Forfeiture.—Where a grant of land and connected franchises is made to a corporation for the construction of a railroad by a statute, which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act without judicial proceedings to ascertain and determine the failure of the grantee. Any public assertion by legislative act of the ownership of the state after the default of the grantee, such as an act resuming control of the road and franchises and appropriating them to particular uses, or granting them to another corporation to perform the work, is equally effective and operative.

Appeal from the Circuit Court of the United States for the District of Minnesota.

On the 3d of March, 1857, Congress passed an act granting certain lands to the territory of Minnesota, for the purpose of aiding in the construction of several lines of railroad between different points in the territory. These lands were to consist of the alternate sections, designated by odd numbers, for six sections in width, on each side of the several lines of road, and were to be selected within fifteen miles therefrom. The act declared that the lands should be exclusively applied to the construction of that road on account of which they were granted, and to no other purpose whatever, and that they should be disposed of by the territory or future state only as the work progressed, and only in the manner following: that is to say, a quantity of land, not exceeding one hundred and twenty sections for each of the roads, and included within a continuous length of twenty miles of the road, might be sold, and when the governor of the territory or the future state should certify to the secretary of the interior that any continuous twenty miles of any of the roads were completed, then another like quantity of the land granted might be sold; and so from time to time, until the roads were completed; and that if any of the roads was not completed within ten years, no further sales should be made, and the lands unsold should revert to the United States.

On the 19th of May of the same year the territory accepted the grant thus made upon the terms, conditions, and restrictions contained in the act of Congress; and on the 22d of the month passed an act for the execution of the trust. By that act it authorized four different companies to construct the roads in aid of which the congressional grant was made, each company a distinct road. Three of these companies were at the time in existence; one of them, the Minnesota and Pacific Railroad Company, was created by the act. This latter company was authorized to construct the road from Stillwater, by way of Saint Paul and Saint Anthony, to the town of Breckenridge, on the Sioux Wood river, with a branch from Saint Anthony to Saint Vincent, near the mouth of the Pembina river. And for the purpose of aiding in its construction, the act granted to the company the interest and estate present and prospective of the territory and of the future state in the lands granted by Congress along the line of the road, subject, however, to the proviso that the title of the lands should vest in the company, as follows: of the first one hundred and twenty sections, whenever twenty or more continuous miles of the road should be located and the governor should certify the same to the secretary of the interior, and afterwards of a like number of sections whenever and as often as twenty continuous miles of the road should be completed so as to admit of running regular trains, and the governor should certify the fact to the secretary.

By the same act the company was authorized to borrow money and to execute its bonds and mortgages and other obligations for the same, or for any liabilities incurred in the construction, repair, equipment, or operating of the line, upon any part of its railroad or branches, and upon the estate granted by the act, and upon any or all of its other property.

The company organized under the act, and accepted the grant made by its provisions upon the terms and conditions mentioned, and during the year had the greater part of the line of its road surveyed and located, and maps of the same filed with the governor of the territory and the commissioner of the general land office at Washington. The location of the line was approved by the secretary of the interior, and by his directions the lands granted along the line were withdrawn from sale and settlement. A contract, as alleged, was also made with a responsible party for the construction of the main line of the road, but work under it was only prosecuted for a month, when the contract was abandoned. No portion of the road was completed, and the failure of the company in this

respect was ascribed to the general embarrassed financial condition of the country, in consequence of which it was unable to raise the necessary funds to proceed with the work.

The territory of Minnesota became a state in October, 1857, though not admitted into the Union until May, 1858. Its constitution prohibited the loan of the state credit in aid of any corporation; but the first legislature assembled under it, being desirous of expediting the constitution of the lines of the road, in aid of which the congressional grant was made, proposed in March, 1858, an amendment to the constitution, removing this prohibition so far as the four companies named in act of May 22, 1857, were concerned. The amendment was submitted to the people, and on the 15th of April, of the same year, was adopted. This amendment provided that the governor should cause to be issued and delivered to each of the four companies special bonds of the state to the amount of twelve hundred and fifty thousand dollars, in installments of one hundred thousand dollars, as often as any ten miles of its road was ready for placing the superstructure thereon, and an additional installment of the same amount as often as that number of miles of the road was fully completed and the cars were running thereon, until the whole amount authorized was issued. The bonds were to be denominated Minnesota state railroad bonds, were to draw interest at the rate of seven per cent. per annum, payable semi-annally in the city of New York, were to be transferable by endorsement of the president of the company, and redeemable at any time after ten and before the expiration of twenty-five years from their date; and for the payment of the interest and the redemption of the principal the faith and credit of the state were pledged. The amendment at the same time with this pledge declared that each company should make provision for the redemption of the bonds received by it and payment of the interest accruing thereon, so as to exonerate the treasury of the state from any advances of money for that purpose; and as security therefor, required the governor, before any bonds were issued, to take from each company an instrument pledging the net profits of its road for the payment of the interest, and a conveyance to the state of the first two hundred and forty sections of land, free from prior incumbrances, which the company was or might be authorized to sell to protect the treasurer against loss on the bonds; and also required, as further security, that an amount of first mortgage bonds on the roads, lands, and franchises of the company, corresponding in amount to the state bonds issued to it, should be transfered to the treasurer of the state with the issue of the state bonds. The amendment declared that in case either company made default in the payment of the interest or principal of the bonds issued to it, no more state bonds should be thereafter issued to that company, and that the governor should proceed to sell, in such a manner as might be prescribed by law, its bonds, or the lands held in trust, or require a foreclosure of the mortgage executed to secure the bonds. The amendment further provided that in consideration of the loan, each company which accepted the bonds, should, as a condition thereof, complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and four-fifths of the entire length of its road before the year 1866; and that any failure on the part of the company to complete the number of miles of its road in the manner, and within the several times thus prescribed, should forfeit to the state all the rights, title, and interest of any kind whatsoever in and to any lands granted by the act of May 22d, 1857, together with the franchises connected with the same, not pertaining or applicable to the portion of the road by it constructed, and a fee simple to which had not accrued to the company by reason of such construction.

The Minnesota and Pacific Railroad Company, after the proclamation of the governor of its adoption, accepted the amendment and gave notice to the governor of its acceptance, and that it proposed to avail itself of the loan which the amendment provided.

On the 31st of July, 1858, the company executed to certain trustees named therein, a deed of all that portion of its lines of road, in aid of which the lands had been granted, and of the lands and alienable franchises connected therewith, in trust for the holders present and prospective of twenty-three millions of bonds to be issued under certain restrictions. Nine hundred of these bonds were subsequently issued as therein provided, and some of them were put in circulation. The present suit is brought by the surviving trustees to obtain a decree that this deed is a valid and subsisting lien prior to all other liens and encumbrances upon all the lands, property and franchises described therein, and to enforce the same.

Subsequently during that year the company graded thirty miles of its road and made it ready for the superstructure, and thereupon executed the pledge of net profits, and the conveyance of two hundred and forty sections as provided by the constitutional amendment. But in place of first mortgage bonds secured by a separate deed of trust, the company offered $300,000 of its bonds secured by the trust deed mentioned, of July 31st, 1858, and applied for state bonds of an equal amount. The governor refused to issue the state bonds until a deed of trust was executed specifying a priority of lien of the bonds which the company might deliver to the state. This refusal led to a great deal of controversy and some litigation with the governor, but ultimately, on the 27th of November, 1858, a supplemental deed of trust was executed by the company, authorizing and directing, in case of default in the payment of the interest or principal of its bonds delivered to the state, a foreclosure and sale by the trustees upon the demand of the governor, and in case of their failure or refusal upon his demand, authorizing the governor to make such foreclosure and sale. The governor then issued to the company bonds of the state to the amount of three hundred thousand dollars. Subsequently during that and the following year, 1859, thirty-two and one-half miles more of the road were graded and ready for its superstructure, and $300,000 more of bonds of the state were issued to the company, and a corresponding amount of the first mortgage bonds of the company were delivered to the treasurer. The interest on the state bonds was payable on the first days of June and December, and the interest on the company's bonds was payable on the first days of February and August, of each year.

The company made default in the payment of interest on the state bonds delivered to it, falling due in December, 1859, and the governor demanded of the trustees in the deed of July 31st, 1858, that they should proceed to foreclose the same and sell the trust property. With this demand the trustees never complied.

The company also made default in the payment of interest upon its own bonds delivered to the state, due on the 1st of February, 1860. The legislature accordingly, in March following, passed an act making it the duty of the governor to foreclose the deed of trust, if in his opinion the public interest required it, and upon a sale of the property, rights and franchises covered by the deed, to bid in the same for the state.

The legislature at about the same time proposed an amendment of the constitution of the state prohibiting any law, which levied a tax or made other provisions for the payment of interest or principal of the state bonds issued to the company, from taking effect until the same had been submitted to a vote of the people and been adopted; and also prohibiting any further issue of bonds to the company under the amendment of April 15th, 1858, and abrogating that amendment with a reservation to the state of all rights, remedies and forfeitures accruing thereunder. This amendment was adopted in November, 1860. Whilst it was pending before the people the governor proceeded under the act of the legislature, and had the property covered by the trust deed of the company, with the connected franchises, advertised and sold, the same being purchased on behalf of the state. The sale took place on the 23d of June, 1860.

In March, 1861, the legislature passed an act by which the road, lands, rights and franchises possessed by the company previous to the sale, and all bonds and securities of the company held by the state, were upon certain conditions "released, discharged and restored" to the company free from all liens or claims of the state. These conditions required the construction and equipment of certain portions of the road within designated periods. One of the conditions provided that the company should construct, and put in operation and fully equip for business, that portion of the main line extending from St. Paul to St. Anthony, on or before the first day of the following January, in default of which all the rights and benefits conferred upon the company by virtue of the act should be "forfeited to the state absolutely and without further act or ceremony whatever;" and in case the company should fail to construct the other and further portions of the road and branches within the time or times designated, it should forfeit to the state, in like manner, all the lands, property and franchises pertaining to the unbuilt portions of the road and branch, and in either case, or in any forfeiture under the provisions of the act, the state should hold and be possessed of all the lands, property and franchises forfeited, "without merger or extinguishment, to be used, granted or disposed of for the purpose of aiding and facilitating the construction of said road and branch."

This act the company accepted with all its conditions, but it never completed the portion of the road there designated to be put into operation before the first of the following January, or any portion of its road, as there provided or as provided in the constitutional amendment of 1858, and on the 10th of March, 1862, the legislature, acting upon the forfeiture accruing or supposed to be accruing from the failure of the company in this respect, passed an act creating the Saint Paul and Pacific Railroad Company, and granted to it all the rights, benefits, privileges, property, franchises and interests of the Minnesota and Pacific Railroad Company acquired by the state by virtue of any act or agreement of the company, or anything done or suffered by it, or by virtue of any law of the state or territory, or of the constitution of the state, or from the sale made by the governor, and also all the rights, privileges, franchises, lands and property granted to the company by the act of May 22d, 1857. The new company, and a division company subsequently created out of it, have since constructed the main line of the road and a portion of the branches, and to enable them to do so, have made various deeds of trust and mortgages upon the assumption that the rights of the old Minnesota and Pacific Railroad Company had ceased. These deeds of trust and mortgages amount to many millions of dollars, and are outstanding. These companies and the holders of their bonds, of course, resist the enforcement of the deed of trust in suit. The questions for determination relate; *first*, to the validity of this deed at the time it was executed, or rather to the right of the company to include therein and bind all the lands granted by the act of the territory of May 22d, 1857; and *second*, to the effect of the act of March 10th, 1862, upon the title of the property and connected franchises embraced in the deed of trust.

Mr. Justice FIELD, delivered the opinion of the court.

The act of Congress granting lands to the Territory of Minnesota imposed conditions upon their alienation, except as to the first one hundred and twenty sections, which the Territory could not disregard. It declared, as we have seen, that the lands should be exclusively applied to the construction of the road, in aid of which they were granted, and to no other purpose whatever, and should be disposed of only as the work progressed. It provided that their sale should be made in parcels as specified portions of the road were completed, and only in that manner. The evident intention of Congress was to secure the proceeds of the lands for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of the first one hundred and

twenty sections. The act made the construction of portions of the road a condition precedent to a conveyance of any other parcel by the state. No conveyance in disregard of this condition could pass any title to the company. It was so held by this court in Schulenberg v. Harriman. 21 Wall. 44, s. c. 2 Dillon C. C. R. where we had occasion to consider provisions of a statute identical in terms with the one before us.

The act of May 22d, 1857, passed in advance of any work on the road, conveyed, therefore, no title to the Minnesota and Pacific Railroad Company in the lands granted by Congress, beyond the first one hundred and twenty sections. Of course the mortgage, or deed of trust, subsequently executed by that company, so far as it covered such lands, was inoperative for any purpose.

Whatever interest passed to the company in the one hundred and twenty sections was subject to forfeiture under the constitutional amendment of April 15th, 1857. That amendment, which the company voluntarily accepted, provided, as already stated, that upon failure to complete certain portions of the work within prescribed periods, it should forfeit these lands, and all other lands held by it, with the connected franchises, except such lands as were acquired by construction of portions of the road. The parcels thus earned were excepted from forfeiture. It was certainly competent for the company to subject its property, rights, and franchises conferred, or attempted to be conferred by the act of May 22d, 1857, or derived from any other source, to this liability. Its assent in this respect was one of the conditions upon which it received the loan of the state credit provided by the constitutional amendment. When the assent was given, the relation of the state to the land and connected franchises was precisely as though the condition had been originally incorporated into the grant. The mortgage or deed of trust not having been executed until after the amendment was accepted, and the holding of the lands of the company, with its rights, priviliges, and franchises, having been thus made dependent upon the completion of the road within the periods prescribed, the beneficiaries under that instrument took whatever security it afforded in subordination to the rights of the state to enforce the forfeiture provided. That forfeiture was enforced by the act of the legislature of March 10th, 1862, unless we are to presume that at the sale made in 1860 by the governor, under the act of March of that year, and the supplemental deed of trust, the entire interest and right of the company were acquired by the state. It is averred in the bill of complaint that this sale was void, and that it was so adjudged by a district court of the state. If this adjudication was valid and the sale was void, the forfeiture provided by the constitutional amendment was enforced by the act mentioned. A forfeiture by the state of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination, that is, by judicial proceedings, is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the state, after default of the grantee, such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object, will be equally effectual and operative. It was so decided in United States v. Repentigny, 5 Wall. 211, and in Schulenberg v. Harriman, 21 Wall. 64, with respect to real property held upon conditions subsequent. In the former case the court said that "a legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings." And there would seem to be no valid reason why the same rule should not apply to franchises held in connection with real property and subject to like conditions, where the franchises were created for the purpose of carrying out the public object for which the real property was granted.

In this case there were special reasons for the provision for a forfeiture, and for its immediate enforcement by the state, in case of the grantee's failure to construct designated portions of the road within the time prescribed. The act of Congress provided, that in case the road was not completed within ten years, the lands of the grant then remaining unsold should revert to the United States. It was, therefore, necessary for the state to see that the construction of the road was commenced and pushed forward, without unnecessary delay, to prevent a possible loss of portions of the grant. By the clause of forfeiture the state was enabled to retain such a control over the lands and connected franchises that, in case the company failed to build the road in time, it could make arrangements with other companies or parties for that purpose. This control would have been defeated if the state had been subjected to the delay of judicial proceedings before a forfeiture could have been enforced. The entire grant would have been lost to the state whilst such proceedings were pending. A more summary mode of divestiture was, therefore, essential, and was contemplated by the parties.

The only inconvenience resulting from any mode other than by judicial proceedings, is that the forfeiture is thus left open to legal contestation when the property is claimed under it, as in this case, against the original holders.

But it is said that provisions for forfeiture are regarded with disfavor and construed with strictness, and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration. But there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work in which the public is interested, where compensation can not be made for the default of the party; nor where the forfeiture is imposed by positive law. "Where any penalty or forfeiture," says Mr. Justice Story, "is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty, or forfeiture, if incurred; for it would be in contravention of the direct expression of the legislative will. Story's Eq. Juris. sec. 1326. The same doctrine is asserted in the case of Peachy v. The Duke of Somerset, reported in 1st Strange, and in that of Keating v. Sparrow, reported in 1st Ball and Beatty. In the first case Lord Macclesfield said that "cases of agreement and conditions of the party and of the laws are certainly to be distinguished; you can never say that the law has determined hardly, but you may that the party has made a hard bargain." In the second case Lord Manners, referring to this language and taking the principle from it, said that "it is manifest that in cases of mere contract between parties, this court will relieve when compensation can be given, but against the provisions of a statute no relief can be given."

For these reasons the forfeiture in this case declared by the legislature can not be interfered with by the court. But, as stated by counsel, the forfeiture will also be upheld on considerations of public policy, as well as from the impossibility of obtaining compensation from the railroad company for its default, on the same principle upon which courts of equity refuse to relieve against forfeitures incurred under the by-laws of corporations for the non-payment of stock subscriptions. To this subject Mr. Justice Story refers in his Commentaries, and after stating the general doctrine that courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions, where there can not be any just compensation for the breach, says:

"It is upon grounds somewhat similar, aided also by considerations of public policy, and the necessity of a prompt performance, in order to accomplish public or corporate objects, that courts of equity, in cases of the non-compliance by stockholders with the terms of payment of their installments of stock at the times prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture. The same rule is, for the same reasons, applied to cases of subscriptions to government loans, where the shares of the stock are agreed to be forfeited by the want of a punctual compliance with the terms of the loan, as to the time, and mode, and place of payment."

The case of Sparks v. The Liverpool Waterworks Company, cited by counsel, is a strong illustration of this doctrine. 13 Vesey, 428. The company there was incorporated to supply the town and port of Liverpool with water, and the property in, and the profits of the undertaking were vested in the company in such shares and subject to such conditions as should be agreed upon. By articles of agreement a committee of the company was authorized to call upon the shareholders for the several sums payable by them on their respective shares, and it was, among other things, provided that in case any shareholder made default in the payment of his calls for twenty-one days after the time appointed, and for ten days after subsequent notice addressed to his then, or last usual place of abode, his share or shares should be absolutely forfeited for the benefit of the other members of the corporation. The plaintiff was the owner of certain shares of stock in the company, upon which payment had been made upon thirty-four calls. The payment of the thirty-fifth call was omitted through his failure to receive personal notice of the call, it having been sent to his town residence whilst he was absent in the country, and not having been forwarded to him. For the non-payment upon the call, his shares were declared forfeited. Immediately upon receiving information of the call, on his return to the city, he gave directions for its payment, and on the following day the amount was sent to the bankers of the company. The committee of the company, however, informed him that they could give him no relief, as they had acted according to the laws of the company, from which no deviation could be made. The plaintiff thereupon filed a bill for relief against the forfeiture, on the grounds of accident, and that compensation might be made, and no injury be sustained by the company; his counsel also insisting upon the invalidity of the by-law, as unreasonable, exorbitant, and uncertain; but the court dismissed the bill for the reason that the enterprise was a public undertaking requiring for its successful prosecution punctuality of payment from the shareholders. Considerations of public policy forbade the granting of relief, for, as the court observed, "if this species of equity is open to the parties engaged in these undertakings they could not be carried on."

The act of March 10th, 1862, is a clear assertion of forfeiture of the estate, rights, privileges, and franchises of the Minnesota and Pacific Railroad Company. It grants all of them in express terms to the new company, and makes them in its possession subject to be forfeited to the state if the conditions annexed are not performed. And the failure of the original company to complete any portion of the road, as provided in the amendment of 1858, is not questioned by the complainants. Their position is that the state had previously lost the right to a forfeiture by her own breaches of the amendment; that forfeiture could not be effected without judicial process and judgment, and that the forfeiture, if any accrued, was waived by the act of March 8th, 1861, and its acceptance by the company.

The alleged breaches of the amendment by the state, at least such as are entitled to notice, consist in the refusal of the governor to receive

the bonds of the company secured by the trust deed of July 31st, 1858, as the first mortgage bonds required to be delivered to the treasurer in exchange for the state bonds, the exaction of the supplemental trust deed, and the adoption of the constitutional amendment of November, 1860, abrogating the amendment of 1858, and prohibiting any law which levied a tax, or made other provisions for the payment of the bonds of the state from taking effect, until submitted to a vote of the people and adopted.

The amendment of 1858 evidently contemplated that the first mortgage bonds of the company delivered to the treasurer in exchange for state bonds, should be secured by a separate deed of trust, or at least, by a deed which could be enforced by the governor, and not by a deed executed to parties over whom he could exercise no control. Whether the supplemental deed of trust was a sufficient compliance with the provision of the amendment, and whether it could create a priority of lien in favor of the bonds transferred to the state, over bonds previously issued by the company to other creditors, it is unnecessary to determine. If defective or inoperative in either of these particulars, the objection can not be raised by the company. Besides, if it could be considered as a matter of serious doubt whether the state was entitled to require a separate instrument of the character executed, its voluntary execution and acceptance by the governor, and the subsequent exchange of bonds would seem to be a settlement of the question.

The adoption of the constitutional amendment of November, 1860, certainly had the effect to impair the value of the bonds of the state. But it is the holders of those bonds who had a right to complain of this proceeding, not the company or the trustees under the deed in trust. The holders of those bonds looked in the first instance to the state for their payment: the state was primarily liable to them, and they were therefore injuriously affected by the amendment. Whether the company was liable at all to the bondholders on the bonds from the endorsement of its president, it is unnecessary to determine, but assuming such liability, then, as between the company and the state, the company was the principal debtor and the state only a surety, and with that relation existing, the company could not complain that the state, its surety, did not pay the bonds, interest or principal. And the trustees could not complain, for no right of contract between them and the company, or between them and the state, was impaired by the proceeding.

The amendment of 1858 prohibited any further issue of state bonds whenever the company made default in meeting the interest on those issued. The withholding, therefore, of any further bonds after such default violated no contract of the state with the company, nor did it impair the right of the state to enforce a forfeiture of its grant, if the stipulated conditions as to the completion of the road were not complied with. After such default (no redemption from it having been made) all obligation of the state to the company ceased; its obligation remained only to its bondholders. That obligation still remains and will remain until the pledge of its faith for the payment of the bonds is redeemed.

As to the alleged waiver of the forfeiture by the act of March 8th, 1861, and its acceptance by the company, only a word need be said. The waiver, if the provisions of the act can be construed as such, was only conditional, and the condition was not complied with. There had previously been, as already stated, a foreclosure and sale of the property, rights, and franchises of the company under its supplemental deed of trust, pursuant to the act of the legislature of the previous year, and at the sale the state had become the purchaser. The act of March 8th, 1861, released and restored to the company the road, lands, rights, and franchises which it had possessed previous to the sale, and all bonds and securities of the company held by the state, free from all liens or claims thereon. The release and restoration were upon express conditions, one of which was that the company would construct and put into operation before the following January, a designated portion of its road, and the act declared that upon the default of the company in this respect, all the rights and benefits conferred by virtue of the act should be "forfeited to the state absolutely and without any further act or ceremony whatever," to be held by the state "without merger or extinguishment, to be used, granted or disposed of, for the purpose of aiding and facilitating the construction of said road and branch." The designated portion of the road was not constructed within the prescribed period, and never has been constructed; and it was with reference to the forfeiture provided for its default in this respect, as well as the forfeiture provided by the amendment of 1858, that the act of March 10th, 1862, was passed. That act operated to divest the company of all interest in the one hundred and twenty sections of land and connected franchises transferred to it by the territory in 1857, or subsequently acquired.

It follows from these views that the court below properly sustained the demurrer to the bill, and its decree is, therefore, affirmed.

Book Notice.

A Treatise on the Law of Negotiable Instruments. By John W. Daniel, Esq., of the Lynchburg, Va., Bar. In two Volumes. New York: Baker, Voorhis & Co. 1876.

Ours is eminently the age of commerce. It is not too much to affirm that commerce, more than any other agency, save one, is the most effective in civilizing nations, and then bringing them together in its peaceful bonds. As the vast interests embarked in commercial pursuits are the first to suffer, and suffer the most disastrously, so this interest is the first to take alarm at the sight of "grim visaged war," and the most vigorous ally of peace. Negotiable instruments are the legitimate child of commerce, and the great commercial transactions between nations, and between different portions of the same nation, which mark our age, could be carried on only with difficulty, but for the invention of negotiable instruments. These have literally fought their way into our law; and they have constantly expanded to meet the expanding necessities of commercial intercourse. And the author in an excellent well-written preface fittingly adverts to this fact that coupon bonds so familiar in our day, issued of late years in such great numbers by private and public corporations, were unknown in the United States when Chancellor Kent delivered the lectures which form the basis of his Commentaries, and when Mr. Justice Story published his treatises on Bills and Notes. It is the principle of *negotiability* that confers the peculiar character upon the instruments which fall under the designation of negotiable; and therefore the author is quite right in supposing that philosophically they admit, if they do not require, to be treated together. Accordingly he collects in these volumes, Bills of Exchange; Promissory Notes; Negotiable Bonds and Coupons; Checks; Bank Notes; Certificates of Deposit; Certificates of Stock; Bills of Credit; Bills of Lading; Guaranties; Letters of Credit, and Circular Notes, and points out their resemblances and their differences. To use his own expression, he has "gathered under one roof all the members of the negotiable family," whether full blood or half blood, and he finds, adopting the language of Lord Bacon as applied to the sciences, that they "dwell socially together." We can not in the compass of a brief notice go into detail; but we take sincere pleasure in declaring it as our conviction that this work will take high rank among the best law treatises of the present day. It is well written, thorough, seemingly exhaustive, and we believe from the examination to which we have subjected certain leading topics, that it is an accurate and reliable exposition of the law relating to all the instruments above enumerated, and which fall within the family designation of Negotiable. D.

Queries and Answers.

QUERIES.

[In order to save space, queries inserted in the Journal will hereafter be numbered during the year. In answering queries, correspondents are requested to give the number of the query answered.]

9. Homestead in Missouri—Unincorporated Town.—Can a widow hold as a homestead 20 acres in a town unincorporated, duly laid off in lots, and block-platted, and acknowledged and recorded, etc., or is she confined to thirty square rods, under the statute of Missouri?

J. A. Greer.

10. Right of Action.—In 1871 R contracted with P for a certain tract of land, P representing his title thereto as unclouded. R paid him $326 in cash, one-half of the remainder ($1074) to be paid in one year, and the other half in two years, with interest. R gave his note for that amount subject to those conditions, and P gave R his bond for deed. Subsequently R, finding that P has no title to the land, surrenders P's bond for deed upon his notes being surrendered. In 1874 P died, without the $326 paid being refunded. Wanted to know if an action can be brought to recover it, and who should be made defendant. Cite parallel case.

W. D. J.

Recent Reports.

Reports of Cases Argued and Determined in the Supreme Court of the State of Wisconsin, with Tables of the Cases and Principal Matters. Prepared and Edited for the Reporter by Edwin E. Bryant. O. M. Conover, Official Reporter. Vol. 37. Containing Cases Determined at the January Term, 1875. Chicago: Callaghan & Company. 1876.

This volume embraces the cases decided at the January term, 1875, and, as we are informed by the reporter, will soon be followed by the 38th volume, which will contain the remainder of the cases decided last year. The binding and general typograpical execution of the book are admirable; and so the decisions of the Wisconsin Supreme Court, than which few if any of the Northwest stand higher, come to us in good style. The volume contains near 200 cases. The index is exhaustive, and we observe a new and valuable feature in the table of cases. The more important ones are each accompanied with a brief synopsis or indication of the point decided, giving the reader the advantage of a double index. We subjoin a few cases that have occurred to us as possessing the most general interest.

Alimony—Divorce—Custody of Children.—1. The statute of this state relating to divorce and alimony, proceeds upon the natural duty of the husband to support the wife after, as well as before, divorce, and must be liberally construed to express that duty. 2. By the general rule recognized in divorce courts, alimony may always be based on the husband's income, at the time of the divorce and afterwards. 3. Alimony is not itself an "estate" in the technical legal sense of that word, nor is it a charge upon the husband's estate (if he have one), but is a mere personal charge upon, or duty of, the husband, which the court will enforce against him from time to time, at discretion, compelling the payment thereof from his *income*, whether he have an *estate* or not. 5. The whole estate and income of the husband are subject to the judgment authorized by the statute. 7, 8. Where a judgment of divorce gave the custody of the child to the mother, but directed that the father should be permitted to see it once a week, time, but no place being specified, *held*, that the judgment implied that the child should be kept within the jurisdiction of the court, and within the city of the then common domicile. A subsequent removal of the child by the mother beyond this,

the safety of both seeming to make the removal necessary, is *held* not a contempt of court, nor a bar to the recovery of a subsequent judgment as to alimony. *Campbell v. Campbell*, p. 206.

Official Bond—Distinction Between Virtute and Colore Officii.—In an action against the surety on the official bond given by a village marshal, where the undertaking was that he would "well and faithfully discharge the duties of the office of marshal," etc., the complaint alleged that he in his official capacity as marshal, "claiming to have a writ of replevin duly issued," and "claiming to act under and by virtue of said writ," wrongfully took from the possession of the plaintiff certain personal property. But it did not aver that the marshal *had any writ in fact*. *Held*, on demurrer, that the complaint did not show any act done by the marshal, in the discharge of his official duty, *virtute officii*, but merely an act done *colore officii*, and that the surety could not be charged. *Gerber v. Ackley*, p. 43.

Exception (1) To Whole Charge Nugatory, Unless Wholly Wrong—Negotiable Note. (2) Void in Innocent Hands, when Obtained by False Representations.—1. A general exception to the whole of a charge, is no of avail unless the whole charge was erroneous. 2. A negotiable note to which the maker's signature was obtained by false representations as to the character of the paper itself, he being ignorant of its true character, and having no intention to sign such a paper and being guilty of no negligence in doing so, is *void* even in the hands of a holder for value, before maturity and without notice. *Butler v. Carns*, p. 61.

Taxation—Assessments on Arbitrary Rules Invalid.—1. Under the statute sec. 16, chap. 130, Laws 1868, assessors in listing lands for taxation are required to make the valuation from actual view, and to exercise their judgment with reference to each tract, its advantages or disadvantages of location, the qualily of the soil, the quantity and quality of the standing timber, and all the elements which enter into its value; and an arbitrary classification of lands, by rules which disregard these principles, will render the tax invalid. *Hersey v. Board of Supervisors*, p. 75.

Railway Corporation. (1) Change of Route Invalidates Subscriptions. (2) Right of Tax-payers to Enjoin. (3) Estoppel.—1. A railroad was authorized by its charter to construct a certain route, with power to change and re-locate, "so as not materially to change the route," to connect with any other railroad, or to lease or purchase road or part of any road *running in the direction* named. The defendant, a corporate town, subscribed to the stock. Subsequently the road, without the consent of the town, acquired the franchise of another road running *nearly at right angles* with the line first above described, which it proposed to construct and operate. *Held*, that this was such a change as to release the non-assenting stock subscribers. 2. Tax-payers of the town may maintain this action against the town, its officers and the railroad company, to restrain the issue of bonds in payment of a stock subscription, the town being no longer bound. 3. The answer of the town made before the change, and admitting its liability, on a new complaint after the change,—*held*, the town is *not estopped* by its former answer from denying the obligation of its subscription. *Næsan, et el. v. Town of Port Washington, et al.*, p. 168.

Receiver. (1) When Authorized to Sue. (2) Capacity in Partnership.—1. A receiver who is not expressly authorized to sue by the judgment or order appointing him, may be so authorized by a subsequent order. 2. A receiver who represents all the members of a partnership or corporation, or (as in this case) all the parties to a subscription for a common purpose, may maintain an action against one of the persons so represented, for a sum due from that one to the whole body represented, although the defendant may be ultimately entitled to share in the proceeds of such suit. *Lathrop, Receiver v. Knapp*, p. 307.

Master and Servant—Liability of Master for Injury by Negligence of Fellow-servant—Lex Fori in Personal Actions.—1, 2. The courts of this state having settled that an action will not lie by a servant against his master, for injuries resulting from the negligence of a fellow-servant, where such injury was received in another state which gives a right of action in such cases, action will not lie here. The remedy in personal actions for personal injuries is governed by the *lex fori*. *Anderson v. Milwaukee & St. P. R. R. Co.*, p. 321; *Beltys v. Same*, p. 323.

Criminal Law—Effect of Separation of Jury on Verdict in Capital Case.—1. The separation of a jury during the trial in a capital case is sufficient to set aside verdict of guilty and grant new trial, unless it appears positively that such separation was not followed by improper conduct on the part of the jurors, or by any circumstances calculated to exert an improper influence on the verdict. 2. The affidavits of jurors that they followed the instructions of the court, but not *denying* that they heard expressions of opinions concerning the prisoner or his guilt, on the trial, *held* that they are not sufficient in law to show that the prisoner was not prejudiced by the separation. *Quære*—Can such a negative ever be sufficiently established to support a verdict of guilty in such a case? *State v. Dollings*, p. 396.

Corporations. (1, 2, 3) Organized as Common Carrier, when Contracts Ultra Vires. (4) Money Paid on Executory Contract Ultra Vires Recoverable, but no Action for Damages.—1, 2, 3. The articles of association of plaintiff making it only a common carrier, and not a grain or produce dealer, it may make all contracts necessary to carrying on that business, and *possibly* might lawfully purchase grain for storage and shipment, to give employment to its boats. But in an action on a contract to sell to it a large quantity of wheat, there being nothing in the pleadings to show any such special purpose or contingency, the contract is *ultra vires*, and no damage for breach by either party can be recovered. Money paid upon such an executory agreement is recoverable in an action for money had and received. *N. W. Union Packet Co. v. Shaw*, p. 655.

This volume, we have omitted to state, is lengthily prefaced by the proceedings of the bar meeting of Milwaukee, held in February at Milwaukee, commemorating the life and character of that eminent jurist, Hon. Andrew G. Miller, who for thirty-five years held the office of Territorial and United States District Judge of Wisconsin, and who died in September last.

Briefs.

[The purpose of this column is to aid practitioners in the exchange of briefs on important subjects. For this reason it is impossible for us to notice any brief which does not contain a statement of the case involved. It would be more satisfactory to all concerned, if those sending briefs would send with them succinct outlines of the points. Correspondents expecting to have their briefs noticed, must give their *post office* address.]

Life Insurance—Authority of Agent of Company—Answers to Questions in Application.—St. Louis Life Ins. Co. v. King, *et al.*, Court of Appeals of Kentucky. Argument for plaintiffs and appellees, pp. 25. Action on a policy of insurance, the defence being that the insured did not answer the questions contained in the application fully, fairly and truthfully. K., the party whose life was insured by the policy, was an ignorant man, and answered the interrogatories orally, which answers were taken down in writing by the agent of the company, one L. The questions argued are as follows: 1. Had the agent authority to explain the terms used by the company on the blanks prepared and furnished by them to the agent? 2. In taking down the oral answers, was L. the agent of the company, or K.'s? 3. Was the agent's knowledge of the facts communicated by K., imputable to the company, there being no collusion between them, or fraud? 4. Had K. the right to rely upon L. as the agent of the company, and acting for it in the preparation of the application, and to accept his decision as to what should be written thereon out of K.'s verbal statements, and to abridge them? 5. Are appellants bound by L.'s acts, and are they estopped from questioning the truth or completeness of K.'s answers, until they show that the oral answers actually given were false? 6. Are appellants estopped from insisting that anything in the application thus prepared is false, in order to vitiate the policy? 7. The meaning of the words "good health." Numerous cases are cited. [Address Walter Evans, Esq., Louisville, Ky.]

Fire Insurance—Proof of Loss—Waiver by Company.—American Express Co. v. Triumph Ins. Co., Supreme Court of Ohio. Brief for defendant, pp. 27. Action upon several policies of insurance. Defence: That notice of the loss and proof of claim were not furnished to the company within the time required by the conditions of the policy. Replication. 1. That the limitation clause is inoperative in this case. The theory of this position is, that inasmuch as the policy provides that the assured must furnish proofs as soon as possible after the loss, that if the circumstances of the case be such, that the proofs can not be furnished within such a period as that, by adding thereto the sixty days within which the insurance company has to pay the claim after proofs have been furnished, more than one year from the date of the loss will elapse, then the company can not avail itself of the defence of the failure to bring suit within the year. 2. That the policy in this case is a New York contract, because it was issued and delivered there by agents of the defendant, and is therefore to be governed and interpreted by the laws and decisions of that state; and that, under those decisions, plaintiff's attorney claims that it has been held that the limitation clause of the policy does not begin to run until the *furnishing* of the proofs, and not from the date of the happening of the loss; and, 3. That the defendant, by receiving and retaining the proofs, waived all objection to the same, and to the time within which they were furnished. [Address Moulton, Johnson & Blinn, Cincinnati, O.

Hiring and Service—Secondary Evidence of Lost Document—Objection to Depositions and Evidence.—Kansas Pacific R. R. v. Roberson, Supreme Court of Colorado. Argument for appellee, pp. 31. The points discussed are: 1. That a telegraphic despatch from the agent of appellant to appellee in the words, "Will engage you, to commence October 1st," taken in connection with his acceptance, constituted a general hiring, of itself, which is by law a hiring for a year, both here and in England. Numerous cases are cited in support of the argument. 2. That the answer "he paid no attention to the despatch; threw it away," is a foundation for the introduction of secondary evidence of it. 3. That a specific objection to answers in depositions or evidence must be made, and that a general objection to evidence on the trial, will not serve to bring the case to the appellate court. [Address Bela M. Hughes, Esq., Denver, Co.]

Raised Check.—City Bank of Houston v. First National Bank of Houston, in the Supreme Court of Texas. Brief for appellee on appellants application for a re-hearing. This case is reported in 3 CENTRAL LAW JOURNAL, 324, where the opinion is given in full. [Address Geo. Goldthwaite, Esq., Houston, Texas.]

Legal News and Notes.

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—The Verdict of Juries.—In an action for compensation brought at the Liverpool Assizes, against the Lancashire and Yorkshire Railway Company, it came out that the sum (£130) awarded by the jury had been arrived at by striking the average of the respective amounts jotted down by each juror. The judge condemned this mode of reaching a "true and just" verdict, remarking that he had not seen it resorted to before in Liverpool, although often in Manchester.—[*Law Times.*

—At New Orleans on the 2nd of June, Judge Woods passed the folloing sentences on parties convicted, in distillery cases. John Henderson, sixteen months' imprisonment and $6,000 fine. Wm. M. Todd, sixteen months' imprisonment and $1,000 fine. John R. Beale, sixteen months' imprisonment and $1,000 fine. Otto H. Karstendiek, sixteen months and $2,000 fine. Edward Fehrenback, thirteen months and $1,000 fine. W. G. James, six months and $1,000 fine. The prisoners were all sentenced to the West Virginia Penitentiary.

—We have received from J. W. Marsh, general agent, 722 N. 4th street, St. Louis, numbers thirteen to sixteen of *Zell's Popular Encyclopedia.* We have previously noticed the former numbers of this work, and are glad to see that it continues to bear out our tribute to its excellence. The four parts before us embrace every subject, in alphebetical order, from Card to Copper. Number thirteen containes a handsome colered map of Asia. A very excellent feature of the work is—that where the explanation of a subject is necessarily limited, reference to where fuller information may be found is given.

—We are much gratified to announce the receipt of card of invitation to the Ninth Annual Congress of the United States Law Association, to be held in the Merchants' Exchange, Philadelphia, on the 20th, 21st, and 22nd, of June, 1876. The more particular object of the meeting will be to discuss the subject of a unification of the laws of the different states relating to commercial affairs, and the formation of an inter-state commercial code, to be submitted to the legislature of each state and territory. It is a matter of great importance, and the occasion will doubtless bring together an able and imposing array of the profession, both of the bench and bar.

—The Supreme Court of Indiana, under the head of "incidental expenses" and "stationery," are charged with the following items, and to say the least, they require explanation. Voucher 703. Allowed February 6, 1873—John Pettit, C. J., Supreme Court of Indiana bought of Speigel, Thoms & Co.:

Dec.	31, 1872, repairing mattress	$5 00
Jan.	7, 1873, one walnut bedstead	16 00
Jan.	7, 1873, one spring bottom	9 00
Jan.	7, 1873, one wardrobe	30 00
Jan.	7, 1873, one bureau	20 00
Jan.	7, 1873, one upholstered lounge	30 00
Jan.	7, 1873, one stand	2 50
Jan.	7, 1873, one library chair	6 50
Jan.	7, 1873, one large arm rocker	5 50
Jan.	7, 1873, one rolling office chair	10 00
Jan.	10, 1873, one walnut bedstead	9 00
Jan.	10, 1873, one spring-bed bottom	9 00
Jan.	10, 1873, one bureau washstand	8 00
Jan.	22, 1873, one office-table	20 00

On January 27, 1874, Chief Justice Downey allowed the bill of a washerwoman, for washing twenty-four dozen and ten pieces of clothing as a part of the incidental expenses of the court.

—Judge Henry C. Caldwell, of the United States District Court for the Eastern District of Arkansas, has been during the past week holding the federal courts at St. Louis in place of Judge Treat, who, under advice of his physician, has taken a vacation. On Monday he took up what are known as the railroad cases, being bills in equity to foreclose mortgages on the Atlantic and Pacific Railroad. The readiness with which he gathered up the salient points in these different cases surprised the bar and brought forth numerous expressions of approbation from those present. His firm and yet courteous ruling, and his rapid manner of dispatching business point him out as a judge eminently qualified to get through complicated litigation and work down a crowded docket. He is what the lawyers call a clear-headed judge. Judge Caldwell will remain here until the close of the present term of the circuit and district courts, and when he returns home he will carry with him the admiration and respect of a critical and exacting bar. Judge Treat left for the East on Monday night carrying with him the good wishes of the bar of this city.

—Gamblers on Railway Trains. Upon a question whether a railway company has the right to exclude gamblers from its trains, we find a charge lately delivered by Judge Dundy of the United States District Court of Nebraska. The judge ruled that though a railroad company is bound as a common carrier to take all proper persons, who may apply for transportation over its line, there are some exceptions to this. The person must be upon *lawful* and *legitimate* business. A company would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery; or for interfering with the proper regulations of the company; or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. Hence a railroad company is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled. If the company have inadvertently sold a ticket to such a person it should tender the return of the money paid for such ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz: what he paid for the ticket, and perhaps necessary expenses of his detention.

—Law Reform in Egypt.—Another of the few ties that bound Egypt to Turkey has recently been sundered. Up to this year the Grand Kadee, the head of the administration of Mahomedan law—with which the new tribunals have not interfered in criminal matters and questions concerning the personal status of the Egyptian—was appointed by the Porte, and sent from Constantinople. He purchased his place privately from the Turkish government, which paid no particular regard to his qualifications. All that was required was that he should be an Osmanlee (a Turk) of the orthodox sect of the Hanafees, and that he should know the Koran by heart. It was not even necessary to speak Arabic—the language of the people to whom this great light of the law had to administer justice. He only held the post for a year, during which time he naturally favored wealthy suitors in order to make a profit out of his purchased post. This venal system is now at an end. The last Grand Kadee of the old school has gone back to Stamboul. For the future, the Khedive sends 3,000*l.* a year to the Sheik-el-Islam, the head of the Mahomedan Church, and has the right to appoint his own Grand Kadee. The first native Grand Kadee, whose functions combine those of a judge of assizes, a judge of the court of arches, and a judge of the divorce court, was appointed three weeks ago. He is a man of learning, holds the post *dum bene se gesserit*, and receives a salary af 2,000*l.* a year. He was installed with great pomp and ceremony. The ministers and all the high officials of the state, all the *Ulemas* (the puisne judges, who are under the Grand Kadee), and large bodies of troops were assembled at the palace of Kasr-el-Nil, at Cairo, to receive the head of the law. Rias Pasha, the minister of justice, made a speech on the advantages of the great reform, and expressed confidence in the purity of Mahomedan justice henceforward. The minister then invested the Kadee with his official dress—a robe of green silk (the sacred color of the Prophet),—and he proceeded, with his *Ulemas*, to open his courts.—[*Law Journal.*

—We find in a recent issue of the *Iowa State Register* an interesting account of the meeting of the Bar Association of Iowa held at Des Moines. A very able and instructive address was delivered to a large audience by Hon. James M. Love, of the United States District Court, on the "Progress of the Common Law." Hon. Edward H. Stiles of Ottumwa, also addressed the association on the "Relations which Law and its Administration Sustains to General Literature." The address is not reported in full, but what is given abounds in striking thoughts and glowing periods, and shows that the eloquent speaker had, while wooing the jealous mistress of the law, taken some portion of his time to win the adornments of literary culture. The following extract alludes to one whom Missouri, equally with Iowa, delights to honor. There are no brighter ornaments of the bench or bar in the country than Judge Dillon, and by his able and laborious services as a judge, he well merits the tribute thus happily paid to him: "Without designing to be invidious, may I, for the sake of illustration, select a single instance. Take one whose opinions and learning have given a lustre to the jurisprudence of our own state, and who is, in my humble opinion—and I am happy to say, in the opinion of a majority of the lawyers who have the honor to practise in his court—entitled to rank among the ablest judges and greatest jurists of this or any other country, yet scarcely above forty, and having been on the state and federal bench together for a period of sixteen years, he has yet found time to make the first digest of our decisions, and to write a text-book which will embalm him along with Parsons, Kent and Story, as a profound jurist and an able legal writer. Not only this, but he has made such choice and extensive explorations in the field of general literature as to give a charm to his conversation and a richness to his style of expression that are to be found in but few men." The speaker also paid the following handsome and well-merited compliment to Judge Love: "Without going further, almost as much may be said of his distinguished compeer on the bench, who has delivered the annual address of this association." "Literary accomplishments," he continued, "are necessary to constitute the highest professional type and to produce the greatest exhibition of individual power. The greatest advocate must possess diverse acquirements, a cultivated mind, one stored with varied knowledge of the world about him. This is the secret power that enables him to wring verdicts, as it were, from unwillinghands, to wield that subtle charm of argument that captivates the judgment along with the sympathies of jurors, and which the unlearned can never attain."

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—The board of equalization has fixed the valuation of the road-bed of the Atlantic and Pacific R. R. at $7,000 per mile, and that of the Louisiana and Missouri river, from Cedar City to Louisiana, at the same. Rolling-stock of both roads same as the Missouri Pacific.

—The Verdict of Juries.—In an action for compensation brought at the Liverpool Assizes, against the Lancashire and Yorkshire Railway Company, it came out that the sum (£130) awarded by the jury had been arrived at by striking the average of the respective amounts jotted down by each juror. The judge condemned this mode of reaching a "true and just" verdict, remarking that he had not seen it resorted to before in Liverpool, although often in Manchester.—[*Law Times.*

—At New Orleans on the 2nd of June, Judge Woods passed the following sentences on parties convicted, in distillery cases. John Henderson, sixteen months' imprisonment and $6,000 fine. Wm. M. Todd, sixteen months' imprisonment and $1.000 fine. John R. Beale, sixteen months' imprisonment and $1,000 fine. Otto H. Karstendiek, sixteen months and $2,000 fine. Edward Fehrenback, thirteen months and $1,000 fine. W. G. James, six months and $1,000 fine. The prisoners were all sentenced to the West Virginia Penitentiary.

—We have received from J. W. Marsh, general agent, 722 N. 4th street, St. Louis, numbers thirteen to sixteen of *Zell's Popular Encyclopedia.* We have previously noticed the former numbers of this work, and are glad to see that it continues to bear out our tribute to its excellence. The four parts before us embrace every subject, in alphebetical order. from Card to Copper. Number thirteen containes a handsome colered map of Asia. A very excellent feature of the work is—that where the explanation of a subject is necessarily limited, reference to where fuller information may be found is given.

—We are much gratified to announce the receipt of card of invitation to the Ninth Annual Congress of the United States Law Association, to be held in the Merchants' Exchange, Philadelphia, on the 20th, 21st, and 22nd, of June, 1876. The more particular object of the meeting will be to discuss the subject of a unification of the laws of the different states relating to commercial affairs, and the formation of an inter-state commercial code, to be submitted to the legislature of each state and territory. It is a matter of great importance, and the occasion will doubtless bring together an able and imposing array of the profession, both of the bench and bar.

—The Supreme Court of Indiana, under the head of "incidental expenses" and "stationery," are charged with the following items, and to say the least, they require explanation. Voucher 703. Allowed February 6, 1873—John Pettit, C. J., Supreme Court of Indiana bought of Speigel, Thoms & Co.:

Dec. 31,	1872, repairing mattress	$5 00
Jan. 7,	1873, one walnut bedstead	16 00
Jan. 7,	1873, one spring bottom	9 00
Jan. 7,	1873, one wardrobe	30 00
Jan. 7,	1873, one bureau	20 00
Jan. 7,	1873, one upholstered lounge	30 00
Jan. 7,	1873, one stand	2 50
Jan. 7,	1873, one library chair	6 50
Jan. 7,	1873, one large arm rocker	5 50
Jan. 7,	1873, one rolling office chair	10 00
Jan. 10,	1873, one walnut bedstead	9 00
Jan. 10,	1873, one spring-bed bottom	9 00
Jan. 10,	1873, one bureau washstand	8 00
Jan. 22,	1873, one office-table	20 00

On January 27, 1874, Chief Justice Downey allowed the bill of a washerwoman, for washing twenty-four dozen and ten pieces of clothing as a part of the incidental expenses of the court.

—Judge Henry C. Caldwell, of the United States District Court for the Eastern District of Arkansas, has been during the past week holding the federal courts at St. Louis in place of Judge Treat, who, under advice of his physician, has taken a vacation. On Monday he took up what are known as the railroad cases, being bills in equity to foreclose mortgages on the Atlantic and Pacific Railroad. The readiness with which he gathered up the salient points in these different cases surprised the bar and brought forth numerous expressions of approbation from those present. His firm and yet courteous ruling, and his rapid manner of dispatching business point him out as a judge eminently qualified to get through complicated litigation and work down a crowded docket. He is what the lawyers call a clear-headed judge. Judge Caldwell will remain here until the close of the present term of the circuit and district courts, and when he returns home he will carry with him the admiration and respect of a critical and exacting bar. Judge Treat left for the East on Monday night carrying with him the good wishes of the bar of this city.

—Gamblers on Railway Trains. Upon a question whether a railway company has the right to exclude gamblers from its trains, we find a charge lately delivered by Judge Dundy of the United States District Court of Nebraska. The judge ruled that though a railroad company is bound as a common carrier to take all proper persons, who may apply for transportation over its line, there are some exceptions to this. The person must be upon *lawful* and *legitimate* business. A company would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery; or for interfering with the proper regulations of the company; or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. Hence a railroad company is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled. If the company have inadvertently sold a ticket to such a person it should tender the return of the money paid for such ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz: what he paid for the ticket, and perhaps necessary expenses of his detention.

—Law Reform in Egypt.—Another of the few ties that bound Egypt to Turkey has recently been sundered. Up to this year the Grand Kadee, the head of the administration of Mahomedan law—with which the new tribunals have not interfered in criminal matters and questions concerning the personal status of the Egyptian—was appointed by the Porte, and sent from Constantinople. He purchased his place privately from the Turkish government, which paid no particular regard to his qualifications. All that was required was that he should be an Osmanlee (a Turk) of the orthodox sect of the Hanafees, and that he should know the Koran by heart. It was not even necessary to speak Arabic—the language of the people to whom this great light of the law had to administer justice. He only held the post for a year, during which time he naturally favored wealthy suitors in order to make a profit out of his purchased post. This venal system is now at an end. The last Grand Kadee of the old school has gone back to Stamboul. For the future, the Khedive sends 3,000*l.* a year to the Sheik-el-Islam, the head of the Mahomedan Church, and has the right to appoint his own Grand Kadee. The first native Grand Kadee, whose functions combine those of a judge of assizes, a judge of the court of arches, and a judge of the divorce court, was appointed three weeks ago. He is a man of learning, holds the post *dum bene se gesserit*, and receives a salary af 2,000*l.* a year. He was installed with great pomp and ceremony. The ministers and all the high officials of the state, all the *Ulemas* (the puisne judges, who are under the Grand Kadee), and large bodies of troops were assembled at the palace of Kasr-el-Nil, at Cairo, to receive the head of the law. Rias Pasha, the minister of justice, made a speech on the advantages of the great reform, and expressed confidence in the purity of Mahomedan justice henceforward. The minister then invested the Kadee with his official dress—a robe of green silk (the sacred color of the Prophet),—and he proceeded, with his *Ulemas*, to open his courts.—[*Law Journal.*

—We find in a recent issue of the *Iowa State Register* an interesting account of the meeting of the Bar Association of Iowa held at Des Moines. A very able and instructive address was delivered to a large audience by Hon. James M. Love, of the United States District Court, on the "Progress of the Common Law." Hon. Edward H. Stiles of Ottumwa, also addressed the association on the "Relations which Law and its Administration Sustains to General Literature." The address is not reported in full, but what is given abounds in striking thoughts and glowing periods, and shows that the eloquent speaker had, while wooing the jealous mistress of the law, taken some portion of his time to win the adornments of literary culture. The following extract alludes to one whom Missouri, equally with Iowa, delights to honor. There are no brighter ornaments of the bench or bar in the country than Judge Dillon, and by his able and laborious services as a judge, he well merits the tribute thus happily paid to him: "Without designing to be invidious, may I, for the sake of illustration, select a single instance. Take one whose opinions and learning have given a lustre to the jurisprudence of our own state, and who is, in my humble opinion—and I am happy to say, in the opinion of a majority of the lawyers who have the honor to practise in his court—entitled to rank among the ablest judges and greatest jurists of this or any other country, yet scarcely above forty, and having been on the state and federal bench together for a period of sixteen years, he has yet found time to make the first digest of our decisions, and to write a text-book which will embalm him along with Parsons, Kent and Story, as a profound jurist and an able legal writer. Not only this, but he has made such choice and extensive explorations in the field of general literature as to give a charm to his conversation and a richness to his style of expression that are to be found in but few men." The speaker also paid the following handsome and well-merited compliment to Judge Love: "Without going further, almost as much may be said of his distinguished compeer on the bench, who has delivered the annual address of this association." "Literary accomplishments," he continued, "are necessary to constitute the highest professional type and to produce the greatest exhibition of individual power. The greatest advocate must possess diverse acquirements, a cultivated mind, one stored with varied knowledge of the world about him. This is the secret power that enables him to wring verdicts, as it were, from unwillinghands, to wield that subtle charm of argument that captivates the judgment along with the sympathies of jurors, and which the unlearned can never attain."